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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 32

FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED, PETITIONERS,

vs.

ETHEL ADELAIDE FIELD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 16, 1940.

CERTIORARI GRANTED APRIL 22, 1940.

SUPREME COURT OF THE UNITED STATES

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—8736

IN THE

District Court of the United States,

FOR THE DISTRICT OF NEW JERSEY.

No. E-5723. IN EQUITY.

ETHEL ADELAIDE FIELD,

v.

FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED, AND UNITED STATES SAVINGS BANK OF NEWARK.

DOCKET ENTRIES.

May 19, 1937.	Bill of Complaint filed.
May 19, 1937.	Subpœna issued.
June 1, 1937.	Subpœna returned, served May 26, filed.
June 9, 1937.	Answer and Cross Bill of United States Savings Bank of Newark, filed.
June 14, 1937.	Answer of Fidelity Union Trust Co. and Minton H. Twinch, &c., filed.
June 21, 1937.	Notice fixing place for Trial filed (Newark).
July 1, 1937.	Interlocutory Decree filed.
July 2, 1937.	$4230.36 Deposited into Registry (U. S. Savings Bank of Newark).
July 2, 1937.	Defendants Costs taxed at $125.00 filed (U. S. Savings Bank of Newark).
July 9, 1937.	$125. mailed to Joseph Kahrs.

Jan. 6, 1938.	$4,063.06 check mailed to Hood, Lafferty & Campbell.
Feb. 3, 1938.	Notice to Reinstate case to Trial calendar, filed.
Feb. 7, 1938.	Hearing on Motion to reinstate case for Trial. To go on trial within one month. (Clark).
Dec. 29, 1938.	Findings of Fact and Conclusions of Law and Judgment for Defendant, and Ordering Clerk to pay out moneys on Deposit, filed.
Mar. 20, 1939.	Notice of Appeal filed (Copy sent to Circuit Court, H. L. & C. & Frances H. Welsh).
Mar. 20, 1939.	Bond on Appeal filed.
Mar. 22, 1939.	Receipt from Circuit Court of Appeals of Notice of Appeal, filed.

BILL OF COMPLAINT.

(Filed May 19, 1937.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

No. E-5723. IN EQUITY.

Ethel Adelaide Field,

Complainant,

v.

Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, Deceased, and United States Savings Bank of Newark,

Defendants.

To the Honorable Judges of the District Court of the United States for the District of New Jersey:

ETHEL ADELAIDE FIELD, the complainant herein, by Russell C. MacFall, Esq., her solicitor, respectfully represents and shows to the Court as follows:

1. The complainant Ethel Adelaide Field is a citizen of the State of New York and United States of America, and a resident of the State of New York, residing at No. 123 East Fifty-third Street, in the Borough of Manhattan, City, County and State of New York.

2. Upon information and belief the defendant Minton H. Twinch is a citizen and resident of the State of New Jersey, and resides at No. 65 South Harrison Street, in the City of East Orange, County of Essex and State of New Jersey.

3. Upon information and belief the defendants Fidelity Union Trust Company and United States Savings Bank of Newark are corporations duly organized and existing under and by virtue of the laws of the State of New Jersey, and are citizens and residents of that state, having their principal offices in the City of Newark, County of Essex and State of New Jersey.

4. This is a suit of a civil nature in equity between citizens of different states, and the amount involved in this controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars.

5. Upon information and belief one Edith M. Peck died on the sixth day of January, 1935, a resident of the County of Essex, State of New Jersey, leaving a last will and testament, and on or about the eighteenth day of January, 1935, the defendants Fidelity Union Trust Company and Minton H. Twinch were duly appointed as the executors of her said last will and testament, duly qualified as such, and ever since have been and still are acting as such executors.

6. Upon information and belief the said Edith M. Peck prior to her death opened and maintained a savings account in her own name with the defendant United States Savings Bank, and on or about the second day of January, 1935 she caused said account to be transferred so that the same stood in the name of Edith M. Peck in trust for Ethel Adelaide Field, and that said account and the balance to the credit thereof remained in such form until and including the time of the death of the said Edith M. Peck.

7. Upon information and belief the said Edith M. Peck transferred said account as aforesaid with the intent and purpose of creating a valid trust of the balance standing to the credit of said account, for the benefit of the complainant herein, and no other or further notice of the existence and terms of a legal and valid trust was given in writing to the said defendant savings bank.

8. Upon information and belief the balance standing to the credit of the said account on January 6, 1935, the date of the death of the said Edith M. Peck was in the approximate sum of $4000; and that said sum, together with accumulations of interest thereon, now remains on deposit with the defendant United States Savings Bank in the said account as aforesaid.

9. By virtue of the provisions of Chapters 40 and 41 of the Public Laws of New Jersey 1932, pages 59 and 60, which were duly passed and became laws of the State of New Jersey in 1932, and which were in full force and effect at the time of the death of the said Edith M. Peck, the trustee named in said savings bank account, the complainant, upon the death of the said trustee as aforesaid, duly succeeded as the beneficiary thereof to all rights in said savings account and became entitled to the balance or sum then standing to the credit of said account as the named beneficiary for whom the said deposit in trust was made.

10. Upon information and belief the passbook representing said trust account is in the possession of the said defendants Fidelity Union Trust Company and Minton H. Twinch, who are the executors of the estate of Edith M. Peck, deceased, and that said defendants have failed and refused to deliver to the complainant the said passbook, and claim a right or title thereto on behalf of the estate of Edith M. Peck.

11. Upon information and belief the defendant United States Savings Bank has failed and refused to pay over the said sum standing to the credit of said account to the complainant unless the said passbook is presented by the complainant to the said defendant, and unless the said defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the estate of Edith M. Peck, as aforesaid, first consent to such payment.

12. Complainant is the person intended to be designated as beneficiary of said trust account, and is the same person as named as such beneficiary.

13. Complainant has no adequate remedy at law, and therefore prays for equitable relief.

WHEREFORE your complainant prays for equitable relief as follows:

a. That a writ of subpœna in the usual form, directed to the Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, and to the United States Savings Bank, the defendants, issue out of the office of the clerk and under the seal of this court, directing said defendants to be and appear before this Honorable Court on a certain date, then and there to make full, true and correct answer to this bill of complaint, but not under oath, answer under oath being expressly waived, and that said defendants be required to stand by, perform and abide by such further orders, directions and decrees that may be made against them in the premises, and that shall seem proper and right in equity and good conscience;

b. That an order may be issued without notice temporarily enjoining and restraining the said defendant United States Savings Bank and its officers, attorneys, employees and agents, from transferring, paying or otherwise disposing of the said balance standing upon its books to the credit of the said savings account hereinabove described, and temporarily enjoining and restraining the said defendants Fidelity Union Trust Company, its officers, attorneys, employees and agents, and Minton H. Twinch, as executors of the estate of Edith M. Peck, deceased, from transferring or otherwise disposing of the passbook of said savings bank account and collecting the proceeds thereof, until the further order of this Court; and that said defendants in and by said order be directed to show cause why said injunction should not be made permanent, and why such other and further relief in the premises as may be just and equitable should not be granted.

c. That this Honorable Court shall order and decree that the said defendants Fidelity Union Trust Company and Minton H. Twinch, as executors as aforesaid, shall surrender and deliver to the complainant the said passbook of the savings account with the United States Saving Bank standing in the name of Edith M. Peck in trust for Ethel Adelaide Field.

d. That this Honorable Court shall order and decree that the balance standing to the credit of said savings bank account is the property of the complainant, and that the said defendant United States Savings Bank be ordered and directed to pay over to the complainant the said balance of said account, together with all accumulations thereto to the date of such payment, upon the surrender and delivery to it of the said passbook; and that it shall be further ordered and decreed that the defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the estate of Edith M. Peck, deceased, have no right of property or interest in said savings account or in the balance standing to the credit thereof.

e. That the complainant have such other, further and adequate relief in the premises as equity and the nature of the circumstances of the case may require, and as this Honorable Court shall deem just, proper and equitable.

ETHEL ADELAIDE FIELD.
Complainant.

RUSSELL C. MACFALL,
Solicitor for Complainant.
31 East Ridgewood Avenue,
Ridgewood, N. J.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

ETHEL ADELAIDE FIELD, being first duly sworn, deposes and says that she is the complainant named in the foregoing bill of complaint; that she has read and subscribed to the said bill of complaint, and that the allegations and statements set forth therein are true, except as to those stated upon information and belief, and as to such she is informed and believes they are true.

ETHEL ADELAIDE FIELD.

Subscribed in my presence and sworn to before me this fourteenth day of May, 1937.

J. E. MUNIZ, JR.,
(Seal) *Notary Public.*

Queens Co. Clerk No. 2304.
Filed in N. Y. Co. Clerk No. 989. Register 9M596.
Term expires March 30, 1939.

ANSWER OF DEFENDANTS FIDELITY UNION TRUST COMPANY AND MINTON H. TWINCH, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF EDITH M. PECK, DECEASED.

(Filed June 14, 1937.)

Answer of the defendants Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased.

The defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, answering the bill of complaint say that:

1. Paragraphs 1, 2, 3, 4, 5 and 6 are admitted.

2. Answering the statements contained in paragraph 7, these defendants deny that a valid trust was created by the transfer alleged therein.

3. Paragraph 8 is admitted.

4. Answering the statements contained in paragraph 9, these defendants deny that the said complainant upon the the death of the said Edith M. Peck or at any other time succeeded as beneficiary to the rights in said savings account or became entitled to the sum then outstanding in said account either by virtue of the statutes cited in said paragraph or otherwise by operation of law.

5. Paragraph 10 is admitted. These defendants further say that the entire legal and equitable title to said passbook is vested in these defendants in their capacity as executors under the last will and testament of Edith M. Peck, deceased.

6. Paragraph 11 is admitted.

7. Answering the statements contained in paragraph 12, these defendants admit the identity of the person named

in the account in the United States Savings Bank of Newark, but deny that the complainant has any legal or equitable interest therein as beneficiary or otherwise.

8. Further answering the bill of complaint, these defendants say that the said Edith M. Peck prior to her death opened and maintained a savings account in her name in the United States Savings Bank of Newark. On or about the first or second day of January 1935, and shortly prior to her death, she expressed the desire that she, the said Edith M. Peck, should, during the remainder of her lifetime, continue to retain exclusive control over said account with the sole right of withdrawal therefrom, redesignation thereof, and right of revocation of any previous disposition, and that no one else should have any right during her lifetime whatsoever with respect thereto, but that she desired upon her death that the balance of the same then remaining in her account should be payable to the complainant. Accordingly, on or about the second day of January 1935, she caused said account to be transferred upon the records of the United States Savings Bank of Newark so that the designation of the account appeared as follows: "Edith M. Peck in trust for Ethel Adelaide Field." The said Edith M. Peck did not at that time nor did she at any time thereafter notify the complainant that the account had been so designated by her, nor did she at any time thereafter perform or cause to be performed any other act in connection with said account prior to the date of her death. She made no subsequent additions thereto or withdrawals thereof, and she at all times kept the passbook in her possession to the end that she alone should have exclusive right to receive the benefit of said account, to withdraw same or any part thereof; and to make a further change of designation if she should so desire; nor did the complainant at any time sign a signature card in reference to said account nor did she at any time have any right to make any withdrawals therefrom or other disposition thereof.

WHEREFORE, these defendants say that no gift inter vivos to the complainant was thereby established and also that no valid trust was created nor any valid gift thereof was made, since the intent, if any, to transmit title to the fund on deposit only upon the death of the donor was in effect a testamentary gift and invalid because not made in accordance with the requirements of the statutes of wills in the State of New Jersey. These defendants further say that upon the death of the said Edith M. Peck, title to said passbook and the funds then on deposit in the United States Savings Bank of Newark passed to and are vested in them absolutely as executors of her last will and testament and are distributable pursuant to the terms thereof and that neither the complainant nor any other person or party has any legal or equitable interest therein.

These defendants reserve the right at or before the final hearing of this cause to apply for an order to strike out the bill of complaint on the ground that it does not set forth establishment of a valid trust of said fund on deposit nor any valid gift thereof and is otherwise vague, irrelevant, uncertain, and does not set forth a cause of action.

HOOD, LAFFERTY & CAMPBELL,
FRANCIS F. WELSH,
Solicitors for Defendants Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, Deceased.

PROCEEDINGS AT HEARING.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF NEW JERSEY.

Ethel Adelaide Field,
Plaintiff,

v.

Fidelity Union Trust Company and Minton H. Twinch as Executors of the Last Will and Testament of Edith M. Peck, Deceased, and United States Savings Bank of Newark,
Defendants.

Appearances:

RUSSELL C. MACFALL, ESQ., for the plaintiff;

FRANCIS F. WELSH, ESQ., for the defendant Minton H. Twinch;

MESSRS. HOOD, LAFFERTY & CAMPBELL, by MR. WALLACE R. CHANDLER, JR., for the defendant Fidelity Union Trust Company.

Before HON. WILLIAM CLARK, *Judge,* at the Post Office Building, Newark, N. J., on Monday, April 25, 1938, at 10:30 A. M.

THE COURT: Is this case ready, gentlemen?

MR. MACFALL: Yes, your Honor.

THE COURT: Have you any witnesses?

MR. MACFALL: Yes, we have.

THE COURT: Will you call them, then; I thought you didn't have the other day; I thought you said it was going to be a stipulated case.

MR. MACFALL: We weren't able to stipulate on the facts; the witnesses are more or less a formality. The essential facts are admitted by the answer.

THE COURT: Then call such witnesses as you have.

ETHEL A. FIELD, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. MACFALL:

Q. Where do you live, Mrs. Field?

A. 123 East Fifty-third Street, New York City.

Q. And you are a resident and citizen of the State of New York?

A. I am.

Q. Did you know Edith M. Peck?

A. I did.

Q. Miss Peck was a resident of——

A. Of Newark, New Jersey.

Q. Were you related to Miss Peck?

A. Not at all.

Q. And how long did you know her?

A. I should say twelve or fifteen years.

Q. This case is a claim for a savings bank account which was opened by Miss Peck in trust for you as beneficiary. Did you know anything about that account prior to Miss Peck's death?

A. I did not.

Q. Do you know the date of her death?

A. I think it was January 6, 1935.

Q. That is all.

(No cross-examination.)

FRANK E. LOTT, called and sworn on behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION.

By MR. MACFALL:

Q. Where do you live, Mr. Lott?

A. Nutley, New Jersey.

Q. You are employed by the Fidelity Union Trust Company, are you not?

A. That's right.

Q. In what capacity?

A. Assistant trust officer.

Q. Did you know the decedent, Edith M. Peck, late of Newark?

A. Yes.

Q. And did you act on behalf of the bank in a fiduciary relationship for the decedent?

A. Yes, we had a custodian account for her.

Q. Did you have occasion to see Miss Peck prior to the time of her death?

A. Yes, quite often.

Q. Can you recall the date?

A. Well, I used to see Miss Peck quite a bit when she was in her last illness. However, my records indicate that I saw her about December the 23d.

Q. Of 1934?

A. Yes.

Q. Did you have a conversation with Miss Peck about a savings bank account which she had at that time in the United States Savings Bank of Newark?

A. I did.

Q. Will you state what Miss Peck said to you in connection with that account?

A. I was called to her home to discuss certain matters with her; she was preparing a will, that is she wanted to make some changes in her will, and asked me to see her counsel. She gave me certain notes to take to him and after she finished she said she wanted to see me alone and asked her secretary, Miss Peterson, to leave the room, and then she informed me of this deposit she had in the United States Savings Bank of some $4000. She said, "I want to have that fixed so that if I die at this time Mrs. Field will be able to get the deposit." I suggested that she should have it in a codicil. She said, "No, that she didn't want anyone to know about it," and of course I was not a savings bank man; I didn't know what the answer was to it.

Q. As a result of that conversation did you do anything?

A. Yes, I went to the United States Savings.

Q. And did you speak with someone there?

A. Yes, Mr. Heyeck, who happens to be here, I believe it was.

Q. And as a result of the conversation, Mr. Lott, did you do anything in connection with this bank account?

A. They suggested that it be put in the name of Edith M. Peck in trust for Ethel Adelaide Field, and gave me a signature card which I took to Miss Peck and had her sign; I believe that was about January 2d.

Q. 1935?

A. 1935, yes, and the account was then opened in that manner.

Q. So that the account which was in Miss Peck's sole name was closed and a new account was opened in the name of Edith M. Peck in trust for Ethel Adelaide Field?

A. That is correct.

Q. Can you state on what date subsequently Miss Peck died?

A. I believe it was the 6th of January.

Q. 1935?

A. 1935.

CROSS-EXAMINATION.

By MR. CHANDLER:

Q. Mr. Lott, did Miss Peck say anything to you with respect to the control of that account during her lifetime?

A. Yes, she did, in this fashion. I said something about the possibility of having a "survivor" account, either or survivor and Miss Peck said no, Mrs. Field's signature would probably be required in that case and she said, "I don't want her to know about it." She said, "I want her to have it if I die now, but if I get better I may not want her to have it." She said, "I don't want anyone to know anything about it."

Q. When this account was changed in the United States Savings Bank, do you recall as to what person or persons had the right to draw upon the changed account?

MR. MACFALL: That is objected to; obviously this witness is not qualified to answer that.

THE COURT: How could he know it?

MR. CHANDLER: Because Mr. Lott himself testified that at Miss Peck's direction he went down and caused this account to be changed. Now that would make the control of that account subject to his direction as her agent.

THE COURT: You may answer, if you know.

A. At the time that I went there?

Q. Yes.

A. I believe it was in Miss Peck's sole name, Edith M. Peck.

Q. Just a minute; did you have any instructions as to how that account was to be payable during Miss Peck's lifetime, as to who might draw upon it?

A. No. Miss Peck merely said that she wanted Mrs. Field to have it if she died, but that she wanted no one to know of the existence of it while she lived or if she got better.

Q. Mr. Lott, when Miss Peck died, she left a will, did she not?

A. She did.

Q. And she appointed the Fidelity Union Trust Company as executor?

A. One of the executors.

MR. CHANDLER: Your Honor please, I have here a certified copy of the last will and testament of Edith M. Peck, deceased, which I would like to offer in evidence.

MR. MACFALL: No objection.

MR. CHANDLER: I think it will be conceded that there is no reference made in the will to this account.

(Received and marked Exhibit D-1.)

Q. Did the Fidelity qualify as executor?

A. Yes.

MR. CHANDLER: I have here a certificate of the surrogate showing the qualification of both executors.

Q. There were two executors, were there not, Mr. Lott?

A. Two executors.

Q. Who were they?

A. Minton H. Twinch and the Fidelity Union Trust Company.

(Received and marked Exhibit D-2.)

Q. Mr. Lott, did you receive a pass book when you made the change in this account?

A. I cannot say definitely, Mr. Chandler; I can't remember that. I remember the card; I think I probably did, but I can't remember.

Q. Have you a pass book now as one of the executors of the estate?

A. Yes.

Q. On that account.

MR. CHANDLER: I offer this in evidence.

MR. MACFALL: May it be shown in the record what the balance is?

MR. CHANDLER: This is a pass book issued by the United States Savings Bank to Edith M. Peck in trust for Ethel Adelaide Field. After "Field" is the name "friend" in parentheses. The pass book shows there is a balance of $4146.82. If your Honor please, I think it will be admitted that the United States Savings Bank paid the balance of the account into this court and that the amount which was paid in was $4230 some odd cents, representing the additional interest and were discharged by order of the Court.

(Pass book is received and marked Exhibit D-3.)

MR. WELSH: $4230.36.

Q. That's all.

MR. MACFALL: I should like to add for the record a statement which will be consented to, I believe.

THE COURT: If it is written out why don't you just file it, counsel?

MR. MACFALL: It is written out in the pleadings; it was alleged in the pleadings and not denied, and that is that the decedent caused this account to be created with the intent and purpose of creating a valid trust for the benefit of the complainant, but that the defendants deny that a valid trust was in fact created, and that in connection with the creation of this trust account no further or other notice of the extent and terms of a legal and valid trust was given to the Savings Bank.

MR. CHANDLER: Your Honor please, that is objected to. We cannot admit any intention on the part of Miss Peck except as appears from the evidence presented.

MR. MACFALL: I simply call attention, then, that that allegation is contained in the complaint and was not denied.

MR. CHANDLER: That is not my construction of the pleadings. My impression is that it was denied.

THE COURT: Well, whatever it is.

MR. MACFALL: Whatever it is, I refer to paragraph 7 of the complaint. Plaintiff rests, if your Honor please.

WILLIAM G. HEYECK, called and sworn on behalf of the defendant United States Savings Bank, testified as follows:

DIRECT EXAMINATION.

By MR. WELSH:

Q. Mr. Heyeck, with whom are you employed?

A. United States Savings Bank.

Q. In what capacity?

A. Auditor.

Q. As auditor did you have charge of a savings account of Edith M. Peck?

A. I did.

Q. And will you state in whose name that account was originally opened?

A. Account No. 145163 originally opened in the name of Edith M. Peck on November 10, 1934, in the amount of $4000.

Q. And was the designation of this account changed?

A. It was changed on January 2, 1935, to read Edith M. Peck in trust for Ethel Adelaide Field, friend.

Q. Have you got the signature card of Miss Peck?

A. I have.

THE COURT: Is this your last witness?

MR. WELSH: Yes, sir. Your Honor please, I have here the signature card of Edith M. Peck in trust for Ethel Adelaide Field, No. 145163 with a notation "Changed 1/2/35." I offer this in evidence.

MR. MACFALL: No objection.

(Received and marked Exhibit D-4.)

Q. The notation was made on that card "In trust for Ethel Adelaide Field" at the time that the account was re-designated, is that right?

A. That's right.

Q. And when the account was originally opened, who had the right to make withdrawals from that account?

A. Miss Peck.

Q. And after the change was made so that there was the trust designation, who had the right to make withdrawals from the account?

A. Miss Peck.

Q. Anybody else?

A. No one else.

Q. Have you got with you a statement or a ledger of that account?

A. I have.

MR. MACFALL: No objection.

MR. WELSH: Your Honor please, I would like to offer in evidence the account of Edith M. Peck in trust for Ethel Adelaide Field No. 145163, showing the original deposit and the subsequent deposits, and withdrawals.

Q. That's all.

CROSS-EXAMINATION.

By MR. MACFALL:

Q. Can you state if there were any deposits in this account by the decedent, or withdrawals by her, prior to her death?

A. Only the original deposit.

Q. So that at the time of her death there had been no withdrawals by the decedent and the only additions had been the credits of interest, is that right?

A. That's correct.

Q. Were you the gentleman who had the conversation with Mr. Lott regarding the opening of this account?

A. I did.

Q. And did you advise Mr. Lott at about the time he testified that if this account were opened in this way, upon the death of Miss Peck the balance would be payable to the beneficiary?

A. That's right.

MR. WELSH: I object.

MR. CHANDLER: The question of what the intent of the parties was is a fact.

THE COURT: Was there any expression of intent made?

MR. MACFALL: Mr. Lott has testified that the decedent wanted to open this account so that if anything happened to her Mrs. Field would get the proceeds of the account. He said that as a result of a conversation he was advised by the bank that if the account were opened in this way that would be the result.

MR. WELSH: The advice from the bank would not be binding upon the defendant.

MR. MACFALL: I don't contend that it is. I simply want to show the intent of the settlor.

THE COURT: You may answer.

Q. The answer was yes?
A. Yes.

THE COURT: Is that the case?

MR. MACFALL: That's the case, your Honor please.

THE COURT: Now, do you want to argue the matter on say Monday, the legal issue, because we will have all the papers ready then?

MR. WELSH: Do you wish us to submit memoranda?

THE COURT: Do you think it is necessary?

MR. WELSH: There are three or four New Jersey cases on the point.

THE COURT: If you will just bring them in. Suppose you submit the cases to your opponent right now in a day or two.

MR. MACFALL: I have already received them; he had a short memorandum, and I have prepared a short memorandum which gives the citations.

THE COURT: Why not leave both memorandums and we will argue and decide it on Monday.

MR. WELSH: Will any argument be necessary? We are willing to submit it on the memorandum.

THE COURT: All right; are both sides willing to do that?

MR. MACFALL: Yes.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT.

(Filed December 29, 1938.)

This cause coming on regularly for trial and the Court having heard and considered the testimony, evidence and arguments of counsel, finds the following facts:

1. The complainant, Ethel Adelaide Field, is a citizen and resident of the State of New York, residing at No. 123 East 53d Street, in the Borough of Manhattan, City, County and State of New York.

2. The defendant, Fidelity Union Trust Company, is a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey.

3. The defendant, Minton H. Twinch, is a citizen and resident of the State of New Jersey.

4. The defendant, United States Savings Bank of Newark, New Jersey, is a corporation of the State of New Jersey, having its principal office in the City of Newark, County of Essex and State of New Jersey.

5. The matter in issue is a suit of a civil nature, in equity between citizens of different states and the amount involved in this controversy, exclusive of interest and costs exceeds the sum of three thousand ($3000) dollars.

6. Edith M. Peck, prior to her death, caused the title of a certain bank account (the subject matter of this cause), standing in her name alone, to be transferred upon the records of the United States Savings Bank of Newark, New Jersey, to the designation of "Edith M. Peck, in trust for Ethel Adelaide Field" retaining exclusive control over said account with the sole right of withdrawal therefrom, redesignation thereof and right of revocation of any previous disposition and gave no further notice of the existence or terms of any trust affecting said account.

7. The said Edith M. Peck subsequently died on January 6th, 1935, a resident and citizen of the County of Essex and State of New Jersey, leaving a last will and testament, duly admitted for probate before the Surrogate of Essex County, in the State of New Jersey, on January 18th, 1935, whereby the said Fidelity Union Trust Company and Minton H. Twinch were appointed executors and duly qualified as such.

8. Subsequent to the institution of this suit, the defendant, the United States Savings Bank of Newark, New Jersey, caused to be paid into this Court, pursuant to an order of this Court, the sum of $4230.66 being the balance of the account standing on its books in the name of "Edith M. Peck, in trust for Ethel Adelaide Field" and, upon such payment into this Court, was dismissed as a party defendant to this suit.

As conclusions of law from the foregoing facts the Court concludes:

1. That under the law of the State of New Jersey, the designation of the bank account "Edith M. Peck, in trust for Ethel Adelaide Field" did not create a trust in fact.

2. That the designation of the said bank account as aforesaid was in effect testamentary in character and as such did not comply with the statute of wills of the State of New Jersey.

3. That Edith M. Peck did not make a valid gift of the said bank account to the complainant, Ethel Adelaide Field.

4. That the complainant, Ethel Adelaide Field, has no right, title or interest in and to the proceeds of said bank account deposited with this Court.

5. That the defendants, Fidelity Union Trust Company and Minton H. Twinch, are entitled to a judgment directing that the amount of said fund deposited in this Court, less

lawful disbursements, be paid to them as executors under the last will and testament of Edith M. Peck, deceased.

Let judgment be entered in conformity herewith.

WILLIAM CLARK,
Judge.

Dated: December 29, 1938.

JUDGMENT.

This cause coming on to be heard and the Court having heard and considered the proofs, arguments and briefs of counsel and having made its findings of fact and conclusions of law;

It is thereupon on this twenty-ninth day of December, 1938, upon the motion of Hood, Lafferty and Campbell and Francis F. Welsh, solicitors of the defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors under the last will and testament of Edith M. Peck and after notification to Russell C. MacFall, solicitor of the complainant, Ethel Adelaide Field, ORDERED, ADJUDGED and DECREED that the said defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors aforesaid, be and the same are hereby entitled to the amount deposited by Edith M. Peck in her lifetime with the United States Savings Bank of Newark, New Jersey, and designated "Edith M. Peck, in trust for Ethel Adelaide Field" and that the complainant has no right, title or interest therein and,

It is further ORDERED, ADJUDGED and DECREED that the amount of the said fund deposited with this Court, to wit, $4230.36, less lawful costs and disbursements, be and the same shall hereby be paid over by the Clerk of this Court to the said defendants and,

It is further ORDERED that the defendants shall be entitled to receive their costs in this cause to be paid out of the said fund.

WILLIAM CLARK,
Judge.

NOTICE OF APPEAL.

(Filed March 20, 1939.)

NOTICE IS HEREBY GIVEN that Ethel Adelaide Field, the complainant above named, hereby appeals to the Circuit Court of Appeals for the Third Circuit, from the final judgment entered in this action on the twenty-ninth day of December, 1938.

Dated March 20th, 1939.

RUSSELL C. MACFALL,
Attorney for Appellant, Ethel Adelaide Field.
31 East Ridgewood Avenue,
Ridgewood, New Jersey.

STIPULATION DESIGNATING CONTENTS OF RECORD ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, pursuant to Rule 75(f) of the Rules of Civil Procedure, that the record on appeal of this cause now pending in the Circuit Court of Appeals for the Third Circuit, shall include the following:

1. The bill of complaint, verified May 14, 1937, and filed May 19, 1937.

2. The answer of the defendants, Fidelity Union Trust Company and Minton H. Twinch, as executors of the last will and testament of Edith M. Peck, deceased, filed June , 1937.

3. The transcript of the trial evidence taken on April 25, 1938, without the exhibits.

4. The findings of fact and conclusions of law, dated December 29, 1938, and filed December 29, 1938.

5. The final judgment, dated December 29, 1938, and filed December 29, 1938.

6. The complainant's notice of appeal, dated and filed March 20, 1939.

7. A stipulation for the record, as follows:

"The parties to this appeal agree that the inclusion in the record on appeal of the exhibits introduced in evidence on the trial of this cause, being fully referred to in the transcript of testimony, shall be dispensed with; and

IT IS FURTHER STIPULATED that the Last Will and Testament of Edith M. Peck, deceased, marked in evidence as Exhibit D-1, was dated the 12th day of January, 1933, with codicil dated January 2, 1935, was duly admitted to probate on the 18th day of January,

1935, by the Surrogate's Court of Essex County, and that the defendants, Fidelity Union Trust Company and Minton H. Twinch, were duly appointed as Executors of the said Last Will and Testament by the said Surrogate's Court of Essex County on or about January 18th, 1935, duly qualified and still are acting as such Executors; that the savings bank account with the United States Savings Bank, of Newark, the subject matter of this suit, was not mentioned or referred to in the said Last Will and Testament, and that the defendant, United States Savings Bank, of Newark, pursuant to an order of this Court, dated July 1, 1937, duly paid into the Court the amount standing to the credit of said bank account, in the sum of $4230.36, and was thereupon discharged from any further defense or participation in this suit."

and

IT IS FURTHER STIPULATED AND AGREED that the said record on appeal may be filed with the Appellate Court as of time.

Dated May 12th, 1939.

RUSSELL C. MACFALL,
Attorney for Complainant-Appellant.

HOOD, LAFFERTY & CAMPBELL,
Attorneys for Defendant-Appellee, Fidelity Union Trust Company, as Executor of the Last Will and Testament of Edith M. Peck, Deceased.

FRANCIS F. WELSH,
Attorney for Defendant-Appellee, Minton H. Twinch, as Executor of the Last Will and Testament of Edith M. Peck, Deceased.

[fol. 29] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

And afterwards, to wit, the 19th day of October, 1939, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Francis Biddle, Honorable Charles Alvin Jones and Honorable Joseph Buffington, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 20th day of December, 1939, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 30] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

Appeal from the District Court of the United States, for the District of New Jersey

OPINION—Filed December 20, 1939

Before Biddle, Jones and Buffington, Circuit Judges

BIDDLE, Circuit Judge:

This appeal involves the construction of the New Jersey Act validating tentative trusts with respect to saving bank

deposits; and the extent to which our court must or should follow two decisions of the Court of Chancery of New Jersey, not a court of final resort, holding the Act void.

Edith M. Peck on January 2, 1935, transferred a savings account with United States Savings Bank of Newark to "Edith M. Peck, in trust for Ethel Adelaide Field". Peck died on January 6, 1935. This transfer was made after she had told the assistant trust officer of Fidelity Union Trust Company, one of her executors, that she wanted Field to get [fol. 31] the deposit when she died. The Savings Bank refused to pay Field the deposit, and she accordingly filed her bill of complaint against it and the executors. The Savings Bank paid the money into court. The District Court for the District of New Jersey awarded the fund to the Executors.

There has been a conflict in the cases as to whether so-called "tentative trusts", in the form of "A in trust for B", create rights in the beneficiary. Obviously such deposits do not fulfill the strict requirements of true trusts. However, they have been accepted as trusts by the weight of authority.[1] But the New Jersey Courts have rejected them, chiefly on the ground that no true trust is created where the donor or settlor still exercises control over the gift. Stevenson v. Earl, 65 N. J. Eq. 721, 55 Atl. 1091; Nicklas v. Parker, 69 N. J. Eq. 743, 61 Atl. 267 (Court of Chancery) affirmed by the Court of Errors and Appeals, 71 N. J. Eq. 777, 71 Atl. 1135.

In 1903 the New Jersey legislature passed an act modifying the law.[2] Although the controlling facts in the Nicklas case occurred after the 1903 statute had been adopted, the court made no reference to the act. This statute is sub-

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[1] Perry, Trusts (6th Ed. 1911) § 96, Note a; Bogert, Trusts and Trustees, § 47; Scott on Trusts (1939) § 58.3; Restatement of the Law, Trusts, § 58, Tentative Trust of Savings Deposit: "Where a person makes a deposit in a savings account in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust."

[2] Sec. 32, 4 Comp. St. 1910, 5666.

stantially identical with the Act of 1932, which we are called upon to consider, except that the earlier Act provided that the money in the deposit "may be paid" to the intended beneficiary; whereas the statute before us requires such pay-
[fol. 32] ment. Apparently because of this phrase, the New Jersey courts, still reluctant to admit a change in the basic law, held that the 1903 Act merely protected payment by the bank to the intended beneficiary, but gave him no rights.[3]

In 1932 the New Jersey Legislature, evidently with the intention of changing the law so as completely to validate tentative trusts, adopted the following statute:

"1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee."[4]

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[3] Jefferson Trust Co. v. Hoboken Trust Co., 107 N. J. Eq. 310, 152 Atl. 374 (Court of Chancery). This is in accord with the general interpretation of similar statutes. Restatement, Trusts, §58, com. d.

[4] It is interesting to note that this section was adopted identically in four different amendments, all of which were approved on March 28, 1932; Ch. 40 to 43 incl. Laws of 1932. These were evidently passed to make certain so far as possible that the titles of the amendments did not offend the provision of the constitution requiring that every law should embrace but one object (Art. IV, Sec. VII, Par. 4). Ch. 40 is entitled: "An Act concerning trust deposits in savings banks, trust companies and banks where other than the deposit in trust no other or further notice is given in writing

[fol. 33] This statute was considered twice in 1936 by the Court of Chancery of New Jersey, a court of original jurisdiction, in Thatcher v. Trenton Trust Company, 119 N. J. Eq. 401, 182 Atl. 912, and Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908. The facts in these two cases cannot be distinguished from those here in question. The *Thatcher* case involved two bank accounts, the first of which was opened prior to the passage of the act, and the second thereafter. Both cases held that the statute did not change the pre-existing law. It is not clear to what extent the cases consider the statute unconstitutional. Before examining more closely the reasoning and result of the cases, we should determine to what extent their decisions bind us.

In Erie R. Co. v. Tompkins [5] it was held that there was no such thing as federal "general" or common law, and that federal courts must apply not only the statutory state law, but the common law of the state as well. The doctrine of Swift v. Tyson had recognized not only the application of state laws, but, necessarily, the application of the state cases construing them. "Rights and titles to things having a permanent locality, such as the rights and titles to real estate" [6] fell, too, into the rule. Four years later the Supreme Court in Beals v. Hale,[7] in construing two apparently conflicting Michigan statutes, arrived at a conclusion similar to that adopted by an inferior state court; and, in emphasizing the principle laid down in prior cases, that the federal courts are bound by the constructions of state statutes by state courts, made it clear that such acceptance was to be accorded only to the highest judicial tribunals. "Had that decision [fol. 34] been made by the highest judicial tribunal of the state, or been shown to accord with a settled usage and practice under these statutes affecting the title to real estate, we should have felt bound to conform to it, as a part of the local law." The court cited supporting cases all decided before Swift v. Tyson. However these decisions do not seem to have

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of the existence and terms of the trust." The other acts amend the act concerning saving banks, the act concerning banks and banking, and the supplement to the act concerning trust companies, respectively.

[5] 304 U. S. 64.

[6] 16 Peters 1, 18.

[7] 4 Howard 37, 54.

crystallized the law to a point where it could be said that only the pronouncements of the highest tribunal of a state are binding.[8] But definitely this is what the court meant in [fol. 35] the Beals case, for the opinion continues: "But though entitled to respect and weight, that case (Weed et al v. Lyon et al, Harr. (Mich.) 363 (1845), decided by the Chancellor) has not been treated as a precedent to control

[8] Polk's Lessee v. Wendall, 9 Cranch 87, 98: "In cases depending on the statutes of a state, and more especially in those respecting title to land, this court adopts the construction of the state *where that construction* is settled, and can be ascertained." It would appear that such construction cannot be "settled" until a decision by the highest state court.

Gardner v. Collins, 2 Pet. 58, 85: "If this question had been settled by *any* judicial decision in the state, where the land lies, we should, upon the uniform principles adopted by this court, recognize that decision as a part of the local law."

Thatcher et al v. Powell et al, 6 Wheat, 119, 127: "In construing the acts of the legislature of a state, *the decisions of the state tribunals* have always governed this court." The court then cites a Tennessee Supreme Court case, Francis's Lessee v. Washburn & Russell, 5 Hayw. 294, as settling the law in Tennessee, but adds: "On the authority of that case, *and on principle,* the court is of opinion, that there is no error in the judgment of the circuit court," thus indicating that had principle been otherwise, opportunity to differ might have been afforded.

Elmendorf v. Taylor, 10 Wheat. 152, 160: ". . . The construction given by the Courts of the several States to the legislative acts of those states, is received as true, unless they come in conflict with the constitution, laws or treaties of the United States."

Shelby v. Guy, 11 Wheat. 361, 367: "That the statute law of the states must furnish the rule of decision to this court, so far as they comport with the constitution of the United States, in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable, that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction." (Emphasis supplied.)

this, because the judgment was not in a court of the last resort, and is said to have been appealed from, but further proceedings defeated by some accident."

In Erie R. R. Co. v. Hilt, 247 U. S. 97, 100, a New Jersey statute forbade recovery to a person injured while walking or playing on any railroad. The trial court, affirmed by the Circuit Court of Appeals for this Circuit, allowed the case to go to the jury, construing the act not to cover the plaintiff who was a child seven years old. The Supreme Court, in an opinion by Mr. Justice Holmes, reversed on the ground that: "The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. Barcolini v. Atlantic City & Shore R. R. Co., 82 N. J. L. 107." The court added: "In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do." Mr. Justice Day and Mr. Justice Clarke dissented, "in the absence of a decision of the highest Court of New Jersey holding otherwise."[9] It should be noted that the court did not express the view that the matter was stare decisis, but followed the decision of the Supreme Court of New Jersey, sitting as an intermediate appellate court, "in view of the importance of that tribunal". Members of the Supreme Court of New Jersey are also members of the Court of Errors and Appeals, the court of last resort of the state, and not, as in our case, trial [fol. 36] judges unconnected with any appellate tribunal. And the Hilt case does not say that the federal courts must follow the decisions of a trial court of New Jersey in construing a New Jersey statute.

A similar conclusion based on the Hilt decision was reached by our court in Berlet v. Lehigh Valley Silk Mills, 287 Fed. 769, 772, where we followed a decision of the Superior Court of Pennsylvania in holding unconstitutional as class legislation the Act of Pennsylvania of May 23, 1907, P. L. 228, as amended, giving throwsters of silk a lien. But

[9] In Oakes v. Mase, 165 U. S. 363, 364, the Supreme Court said: "As this ruling *of the court of last resort* of the state of Montana, interpreting the constitutionality of laws of that state, is binding here * * * (italics supplied".

the Superior Court is an important appellate tribunal whose decision is final (subject to certiorari) in a very broad field of jurisdiction; and the case did not go to the length of saying that its decision was stare decisis, and must be followed. Recently referring to the Superior Court, in Taplinger v. Northwestern Nat. Bank, 101 F. (2d) 274, 278, we used, perhaps, somewhat broad language when we said: "However, since it was squarely raised by the facts of the Kauffman & Baer Case, the decision in that case amounts to a construction of the statute by a Pennsylvania appellate court of high authority which we must accept as binding upon us, even though if the matter were open for our consideration a different conclusion might well be reached."

In North Philadelphia Trust Co. v. Smith, 13 F. (2d) 585, 586, our court followed the decision of the Supreme Court of New Jersey in construing the Negotiable Instruments Law, which was in conflict with the Pennsylvania decisions construing that uniform instrument. We said: "This was a decision by the Supreme Court of New Jersey, not by the Court of Errors and Appeals. That court, however, though not the highest court of the state, is, in the estimation of the Supreme Court of the United States, as shown in Erie R. R. Co. v. Hilt * * * of such standing as to compel the courts of the United States to follow its pronouncements." In Masino v. W. J. & S. S. R. Co., 41 F. (2d) 645, 646, in considering a railroad crossing statute of New Jersey, we spoke of cases which had contrued the act decided by the Supreme [fol. 37] Court of New Jersey, as compelling observance to their decisions. And in Ex Parte Zwillman, 48 F. (2d) 76, 78, quoting at length from the Hilt opinion, we followed the construction of a New Jersey statute relating to the imposition of sentences made by the New Jersey Supreme Court. Our language went a little further in Radin v. Commissioner of Internal Revenue, 33 F. (2d) 39, in determining that an interest in a contract for the purchase of land was real estate by virtue of a decree of the New Jersey Court of Chancery thus ruling. We held, in referring to the rule of law suggested in the Hilt case: "The matter has been decided by a high state court of competent jurisdiction whose decision, involving a rule of property, federal tribunals must follow." But the decision of the state court followed in this case was in the nature of res adjudicata rather than stare decisis. The scope of the case goes no further than to insist that the decision of any state court

construing an instrument is finally determinative on the federal court where the question to be decided depends on such construction. Blair v. Commissioner, 300 U. S. 5.

These cases come pretty close to saying that a federal court must follow the construction of a state statute made by a court not of final resort. But that we have followed such construction does not necessarily involve that in all instances we must do so. The distinction between the authority of appellate courts and of trial courts was made in In re F. & D. Co., 256 Fed. 73, 76, by the Circuit Court of Appeals for the Second Circuit, who were faced with the construction of a lien law of the state of New York by a New York trial court. The decision had been made by special term of the Supreme Court of Saratoga County in Clement v. Congress, 72 Misc. Rep. 519, 132 N. Y. Supp. 16, and the federal court accepted it, emphasizing particularly, however, that the Hilt case did not lay down "a rule which makes it incumbent on this court to adopt a construction given to a state statute by a trial judge in a state [fol. 38] court." The court pointed out the distinction between the Supreme Court of New Jersey, a court composed of nine judges, and the special term of the Supreme Court of New York, consisting of a single trial judge.

Two cases in the Circuit Court of Appeals for the Seventh Circuit seem to be in conflict. In deciding that under the Indiana law a conditional sale of personal property for the purposes of resale with an agreement reserving title in the seller was void, the court felt impelled to follow the decision of the Appellate Court of the state, In re Gilligan, 152 Fed. 604. The statute creating the Appellate Court made its jurisdiction final except in the event that the case was transferred to the Supreme Court or the Supreme Court ordered certification. Yet in Damen & Jarvis Bldg. Corp. v. Mechanics' Ins. Co., 83 F. (2d) 793, the same federal court refused to adopt an interpretation of a fire insurance policy by the same state court where the question had not been adjudicated by the State Supreme Court, and a recent decision of the Supreme Court had indicated doubt.

The Eighth, Sixth and Second Circuits are clear that their courts are not bound by interpretation of a statute by any court other than the highest court of the state. In the Eighth Circuit this conclusion was reached in Anglo-American Land Company v. Lombard, 132 Fed. 721, 741, 742, where the court said: "A fixed and settled rule of decision

in a state court of last resort establishes the law of the state in such manner as to bind the federal courts in all matters controlled by the state law; but the opinions of intermediate appellate courts, like the Kansas City Court of Appeals, while entitled to great respect and regarded as persuasive authority, are not controlling upon the federal courts, because they do not settle the law of the state." In construing a Missouri statute requiring dangerous machinery in factories to be guarded, the same court, in Federal Lead Co. v. Swyers, 161 Fed. 687, 691, refused to follow three cases in the Kansas City Court of Appeals, and said: "While those decisions by reason of the learning and ability [fol. 39] of the distinguished judges who pronounced them, are entitled to our respectful consideration, they are not the decisions of the highest judicial tribunal of the state * * * construing local statutes, which alone are binding upon federal courts." The same court reaffirmed this rule in Westerlund v. Black Bear Mining Co., 203 Fed. 599, 609, in construing a statute dealing with the powers of directors of mining companies. The decision of the Colorado Court of Appeals, not the highest judicial tribunal of the state, was termed "not an authoritative declaration of the law in the state of Colorado * * * " Similarly, Freund v. Yaegerman, 27 Fed. 248 (Circuit Court E. D. of Mo.).

In United States Telephone Co. v. Central Union Tel. Co., 202 Fed. 66, 69, the Circuit Court of Appeals for the Sixth Circuit said: "It is clear that the obligation to follow the lead of the state courts does not arise, unless the court to be followed is the court of last resort in the state * * * and particularly so when the lower court opinions are not unanimous or numerous and old enough to show a settled rule."

Most recently the second circuit, in Irving National Bank v. Law, 9 F. (2d) 536, 537, speaking through Judge Learned Hand, in deciding whether the judgment of the Appellate Division of the Supreme Court of New York on the meaning of a New York statute was conclusive on the federal court, after referring to the cases which we have cited, said: "We understand the doctrine to mean that the highest court of the state, by declaring what a statute means, settles it, because there is no authority which can gainsay it. Yet, however conclusive between parties to a suit the decision of a lower court is of course not authoritative upon the highest court; the statute necessarily remains in nubibus,

and its construction may be as it will." The court refused to follow the conclusion of the Appellate Division. Judge Hand thought that the Gilligan case "stands alone." In Continental Securities Co. v. Interborough R. T. Co., 165 Fed. 945, 959 the Circuit Court for the Southern District of [fol. 40] New York, was of the opinion that the federal courts are not bound by decisions of the Appellate Division. "The lower federal courts are bound by the decisions of the highest court of a state giving construction to the Constitution or statutes of the state * * * but are not bound by its decision on questions of general commercial law, etc."

We believe that the proper rule is that federal courts should in all instances follow the law of the state with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are stare decisis, and must be followed irrespective of our opinion as to what the law ought to be. As to the pronouncements of other state courts, however, we are not so bound, but may conclude that the decision does not truly express the state law.

The Thatcher and Travers cases may now be discussed. In the Thatcher case the Vice-Chancellor held that the Act of 1932 was "ineffective to change the prior rules of law." He spoke of the Act as obviously unconstitutional, though not so stated in the syllabus by the Court. He conceded the attempt of the legislature to accomplish a change in the law, but held the attempt abortive because the language used by the legislature "was confused, impractical and wholly unsatisfactory and difficult to comprehend." He thought that the words "the same or any part thereof" referring to the deposit, although intended to mean "the bank deposit or such part of it as remains," did not say so, and that he could not supply the defects of the legislature. Such a construction violates the plain if not artistic language of the statute, and the fundamental rule of statutory construction that a statute must be construed to give effect to its intent. The Vice-Chancellor found the intent plain, but refused to give it effect.[10] He thought that the provision in the stat-

[10] Compare: "We have the old law, the mischief and the remedy, and it is our duty to 'so construe the act as to suppress the mischief and advance the remedy' 1 Bl. Com. 87." Soden v. Trenton, etc. Traction Co. 101 N. J. L. 393, 396, 127 Atl. 558, 559. In re Merrill, 88 N. J. Eq. 261, 293, 102 Atl. 400, 405.

[fol. 41] ute that no other notice of the existence of the trust had been given to the bank was a condition precedent to the operation of the statute. In the Thatcher case no such notice had been given; in our case it had. The Vice-Chancellor considered, however, that the requirement of notice created an unreasonable and therefore unconstitutional classification, suggesting that where notice was given (as here) the beneficiary would take nothing. But the notice concerns a valid and completed trust and not the type of deposit that the statute validates. The reasonable construction is that it eliminates the necessity of notice of a true trust to the bank as a required step to make the trust existent. Of course if such notice is given to the bank the terms of the notice cover the disposition of the money; but where we have no declaration of trust, merely the opening of a deposit in trust for a named beneficiary, the statute becomes applicable.

In the Travers case the court held that the statute could not operate as an amendment to the Wills Act because of its title. But the Court of Errors and Appeals of the State of New Jersey has indicated that such a deposit is an *inter vivos* trust and not a testamentary disposition, Cutts v. Najdrowski, 123 N. J. Eq. 481, 198 Atl. 885. The deposit read: "Leon Najdrowski intr. for Joseph Najdrowski", and was made in the Williams Bank in New York by a New Jersey depositor whose administratrix claimed it. The Chancellor had held that the law of New Jersey where the depositor had been domiciled, controlled.[11] Although reference was made to both the Thatcher and Travers cases, the statute was not mentioned, nor its construction by these two cases. The Court of Errors and Appeals reversed on the ground that the law of New York governed the transaction, thus necessarily deciding the transaction was in the [fol. 42] nature of a trust inter vivos and not testamentary, for had it been testamentary it would have been governed by the law of New Jersey. Further the Vice-Chancellor held in the Travers case that the act must be ineffective because it applied "whenever any deposit shall be made in trust, and no true trust was created, so that the act did not become effective." The Thatcher case had come to an opposite conclusion, construing the words "in trust" as descriptive of the deposit rather than characterizing its legal

[11] 121 N. J. Eq. 546, 191 Atl. 867.

effect. Serious constitutional defects were hinted, but not specified. The court refused to enforce the Act without clearly saying that it was unconstitutional.[12]

We hold, therefore, that the law of New Jersey is the law expressed in the statute which seems to us clearly constitutional and unambiguous, and that we are not bound to follow contrary decisions of the Chancery Court of New Jersey.

Judgment reversed, with directions to enter a decree in conformity with this opinion.

BUFFINGTON, Circuit Judge (concurring):

I concur in the conclusion reached by the court. The statute of New Jersey is clear and unambiguous; it calls for no construction. But the question is as to the enforcement of a law passed by a sovereign state in a matter of which it has jurisdiction. The wording of the statute is applicable to the facts of the present case. In the absence of any decision by the court of highest resort of New Jersey holding the act unconstitutional and inapplicable, I am of opinion that this court is free to apply the statute to the facts of this case. I therefore concur in the conclusion reached.

[fol. 43] JONES, Circuit Judge (dissenting):

The fundamental question presented by this appeal is of such general importance that I am constrained to state the reasons for my disagreement with the majority.

When Swift v. Tyson, 16 Peters 1, was overruled by Erie Railroad Co. v. Tompkins, 304 U. S. 64, and Section 34 of the Judiciary Act of 1789[1] was held to refer to the common law of a State as well as to its statute law, the Supreme Court made plain that it is the law of a State, as declared by the authority of the State (legislative and judicial) which is binding on a federal court upon a question of local law. Nonetheless, the decision of the majority in

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[12] "But the decision in this cause does not necessarily turn upon the constitutionality of the Act."

[1] Judiciary Act of September 24, 1789, c. 20, 28 USCA Sec. 725.

the present case denies appropriate effect, as it seems to me, to the law of New Jersey as so declared.

From their own independent construction of a statute of New Jersey (Laws of 1932, c. 40 and 41), the majority conclude that Mrs. Field became entitled, upon the death of Miss Peck, to the bank deposit in dispute, notwithstanding that, on two separate occasions and upon facts which, as the majority opinion states, "cannot be distinguished from those here in question", the New Jersey Court of Chancery has held that the statute was ineffectual to accomplish the result which the majority now reaches in the present case. See Thatcher v. Trenton Trust Co., 119 N. J. Eq. 408, 182 Atl. 912, and Travers v. Reid, 119 N. J. Eq. 416, 182 Atl. 908.

No appeal was taken from the final decree in either the Thatcher or Travers case, supra, and, although each was decided early in 1936 and the New Jersey legislature has been in regular session four times since then, the effect of those decisions has not been changed by subsequent legislative action or further judicial decision. Aside from the Thatcher and Travers cases, supra, there are no other reported court decisions of New Jersey construing the Act in [fol. 44] question. Presumably the statute of 1932, as construed by the New Jersey Chancery Court, expresses the law of the State, with reference to the particular subject matter, as the people of New Jersey desire it to be. Such is their right without federal let or hindrance. Undeniably, the Constitution, laws, or treaties of the United States are not involved in the present case in the slightest way. See Erie Railroad Co. v. Tompkins, supra, where Mr. Justice Brandeis, speaking for the majority, quoted with approval from the dissenting opinion of Mr. Justice Field in Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 401, in part, as follows, at page 79,—"Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the State and, to that extent, a denial of is independence."

Yet, the majority conceive that we are free to disregard the decisions of the Chancery Court and to construe the statute as we will. On the contrary, the proper course for

this court, when called upon to ascertain and declare the statute law of a State, would be to accept the statutes of the State, as uniformly construed by its important courts of competent jurisdiction (although not the highest), in the absence of any decision by the State court of last resort. Section 34 of the Judiciary Act of 1789, even as too narrowly restricted by Swift v. Tyson,[2] supra, appears to have required as much. There was then no suggestion that, in the matter of State decisions on statute law binding on federal courts, the "local tribunals" (there specified) meant only a State court of last resort.

[fol. 45] In any event, our duty to apply the statute law of New Jersey as construed by the Court of Chancery of that State is hardly open to question any longer.

In the case of Erie R. R. Co. v. Hilt, 247 U. S. 97, 100, 101 (1918), this court, having declined to follow the construction of a New Jersey statute as theretofore determined by a decision of the Supreme Court of that State (not the court of last resort), made and applied its own independent construction. In reversing the judgment of this court the Supreme Court, in an opinion by Mr. Justice Holmes, said,—

"The words of the statute seem to us to require a different construction from that adopted and they have been given their full literal meaning by the Supreme Court of the State in the case of an infant younger than the plaintiff. *Barcolini v. Atlantic City & Shore R. R. Co.*, 82 N. J. L. 107. *In view of the importance of that tribunal in New Jersey, although not the highest Court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do.*" (Emphasis supplied.)

The question as to whether, in applying the statute law of a State, we are bound to follow only the decisions of the highest court of the State was directly before the Supreme Court in the Hilt case, supra, and was there answered in the negative. This is plainly evidenced by the fact that

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[2] It was said in Swift v. Tyson, 16 Peters 1, that "the true interpretation of the thirty-fourth section limited its application to state laws strictly local, that is to say, to the positive statutes of the state, and the construction thereof adopted by the local tribunals", etc.

two of the members of the Court dissented from the judgment in the Hilt case on the ground that this court was right, "In the absence of a decision of the highest court of New Jersey holding otherwise", when we independently construed the statute contrary to the decision of the New Jersey Supreme Court. But, by direct contrast, the majority of the court ruled otherwise.

Since then, this court has had a number of occasions to comply with the Supreme Court's instructions in the Hilt [fol. 46] case, supra, which we have done uniformly up to the present time with the exception of one instance.

Thus, in expressed obedience to the Hilt case, supra, Murray v. Payne, 273 Fed. 820 (C. C. A., 3rd, 1921), applied the New Jersey Supreme Court's construction of a State statute; likewise, North Philadelphia Trust Co. v. Smith, 13 F. (2d) 585 (C. C. A., 3rd, 1926), followed the construction of the New Jersey Negotiable Instruments Act made by the Supreme Court of that State; Masino v. West Jersey & S. S. R. Co., 41 F. (2d) 645 (C. C. A., 3rd, 1930), cited the Hilt case and said that the Supreme Court of New Jersey was "of sufficient importance to compel observance of its decisions"; and Ex parte Zwillman, 48 F. (2d) 76 (C. C. A., 3rd, 1931), quoting at length from the Hilt case, followed the New Jersey Supreme Court's construction of a New Jersey statute. Also Berlet v. Lehigh Valley Silk Mills, 287 Fed. 769 (C. C. A., 3rd, 1923), and Steinbach, et al., v. Metzger, et al., 63 F. (2d) 74 (C. C. A., 3rd, 1933), each cited the Hilt case in support of their respective observance of a statutory construction in the one case and a decision based on the common law in the other by the Superior Court of Pennsylvania (a high and important court, it is true, but still not the court of last resort). And, in Radin v. Commissioner of Internal Revenue, 33 F. (2d) 39 (C. C. A., 3rd, 1929), this court, in what it deemed to be compliance with the Supreme Court's requirement in the Hilt case, applied as the law of New Jersey a decision of the Chancery Court of that State. True enough, as the majority opinion in the present case points out, the decision in the case last above cited involved a rule of property, and its acceptance could have been as res adjudicata rather than as stare decisis. But, it is not without point that in the Radin case, supra, Judge Woolley, speaking for this court, described the Court of Chancery of New Jersey (with whose decisions we are now concerned) as "a high state court of competent jurisdiction".

Any thought that the ruling in the Hilt case, supra, was because of the Supreme Court's agreement with the New [fol. 47] Jersey court's construction of the particular statute rather than because of the duty resting upon the federal courts, in matters of local law, to follow a State statute, as construed by an important State court of competent jurisdiction, should be dispelled by the later decision of the Supreme Court in the case of Erie Railroad Co. v. Duplak, 286 U. S. 440, 444 (the one earlier instance where this court failed to follow the ruling of the Hilt case). In the Duplak case, supra, the New Jersey decision which this court declined to follow was the same decision by the Supreme Court of New Jersey (Barcolini v. Atlantic City and S. R. R. Co., supra), which had been rejected by this court in the Hilt case. In the Duplak case, supra, the Supreme Court makes no mention of its agreement with the construction of the statute as made by the Supreme Court of New Jersey, but, on the other hand, says, "The effect of the *Hilt* decision is to accept the state statute, as construed by the state court, as having put a negative upon the implied invitation and attractive nuisance doctrines; and the same statute necessarily controls here whatever, otherwise, might be the rule."

As we should have been compelled to observe a decision of the Supreme Court of New Jersey, construing the statute in the present case, as declaratory of the law of the State, it follows, necessarily, that, if we are now at liberty to ignore the construction placed on the statute by the Court of Chancery, it must be because the New Jersey Court of Chancery is not equal in its importance or finality to the Supreme Court of that State. But, such is plainly not the case.

The decrees of the Chancery Court like the judgments of the Supreme Court are state-wide in their effect and in either case are appealable to the Court of Errors and Appeals (the highest State court). There is no intermediate court of appeal empowered to review the work of either. Within their respective jurisdictions, the one in equity and the other at law, the importance and finality of New Jersey's [fol. 48] Court of Chancery is on a parity with that of the Supreme Court of the State. The decisions of the one are not to be treated as stare decisis any more than are the decisions of the other.

The majority describe the Court of Chancery as "a court of original jurisdiction" and the Supreme Court as "an

intermediate appellate court",[3] from which the implication may arise that there is a difference in standing between these two courts with the Court of Chancery in the inferior position. The description is correct so far as it goes, but it fails to suggest the co-extensive territorial jurisdiction of both courts and the equal finality of their respective decres and judgments, save for a direct appeal from either to the court of last resort. Significance is also attached by the majority to the fact that the Judges of the Supreme Court help to compose the Court of Errors and Appeals, but so does the Chancellor, the presiding judicial officer of the Chancery Court, through whom all writs and decrees in equity issue and who supervises and effectuates the adjudications and decrees filed by the Vice-Chancellors.

If further confirmation of the equal importance of these two tribunals, within the State of New Jersey, should be required, let it be noted that the highest court of the State, the Court of Errors and Appeals, regards them as equally important. In Levy v. City of Elizabeth, 81 N. J. L. 643, 80 Atl. 498, 500, the Court of Errors and Appeals, upon an [fol. 49] appeal from the Supreme Court of New Jersey, said, "Irrespective of the inherent merit of this construction, a ruling uniformly made by the Supreme Court over a course of years should not be set aside by us except for cogent and important reasons", etc. Later in Ramsey v. Hutchinson, 117 N. J. L. 222, 187 Atl. 650, again, upon appeal from the Supreme Court of New Jersey, the Court of Errors and Appeals quoted the above from Levy v. City of Elizabeth, supra, and added in brackets, after the words Supreme Court, "or the Court of Chancery". Thus, although the appeal then under consideration was one at law from the Supreme Court of the State, the Court of Errors and Appeals took pains to place the Court of Chancery in

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[3] The appellate jurisdiction of the Supreme Court of New Jersey, when invoked, is optional with the litigant rather than compulsory. Thus, the appellant may take an appeal from a court of first instance at law to the Supreme Court of New Jersey, or he may appeal directly to the Court of Errors and Appeals; and, if he chooses to take his appeal to the Supreme Court, either party may, thereafter appeal, as of right, to the Court of Errors and Appeals from the judgment of the Supreme Court. N. J. Rev. 1877, p. 373 §§ 4 and 5; Rev. Stat. (1937) sections 2:27-351 and 2:27-352.

juxtaposition with the Supreme Court of the State so far as the importance of the decisions of either court is concerned.

The justification for our saying, as the majority in effect do, that the Chancery Court of New Jersey is a less important tribunal than the Supreme Court of that State, is not apparent to me. And, with that distinction gone, the reason for our refusal to follow the decisions of the Chancery Court, pertinent to this case, vanishes completely.

Moreover, the decision of the majority leads directly to the situation where a statute of New Jersey when construed in chancery can never become the law of the State, so as to be binding on a federal court, until it has been passed upon and affirmed by the Court of Errors and Appeals, while the same statute when construed at law (Supreme Court of New Jersey) will bind us, without utterance from the Court of Errors and Appeals, even though the decision is later taken to the latter court for review and there reversed. This resultant anomaly, of itself, argues strongly for our acceptance of the decisions of the Court of Chancery of New Jersey equally with the decisions of the Supreme Court of that State.

While many cases of the past, as the majority opinion discloses, can be cited for the proposition that it is a decision [fol. 50] of the court of last resort of a State which binds a federal court on a question of local law, nevertheless, at least since the Hilt case, supra, we are also bound by the construction of a State statute made by an important court of the State although not the highest.

The intent, scope and effect of a State statute are, in a very real sense, what important courts of the State impute to it, just as effectively as if the statute had been so enacted by the legislature. Until reversed on appeal or offset by the legislature, a decision of a State court of competent jurisdiction construing a statute becomes a component part of the law thus effected. We cannot, therefore, fairly take a statute separate from the decisions construing it and arbitrarily give it our own independent construction. To do so would be to ascertain less or other than the State law. In this connection the words of Mr. Justice Holmes in his dissenting opinion in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 372, which later found effect in the majority opinion in Erie R. R. Co. v. Tompkins, supra, are apposite,—"It is said that we must exercise our independent judgment

—but as to what? Surely as to the law of the States. Whence does that law issue? Certainly not from us. But it does issue and has been recognized by this court as issuing from the state courts as well as from the state legislatures."

Concurrently with the decision of the majority, and growing out of the same New Jersey statute, there will be one rule of law for resident claimants who are committed to the courts of New Jersey, and a different rule for such non-resident claimants as can, by reason of the mere accident of diverse citizenship and amount in controversy, invoke federal jurisdiction for the enforcement of their equally private and local claims. On the other hand, if we would but follow the decisions of the Chancery Court with respect to the particular statute here involved, it could make no difference from the standpoint of a claimant's rights whether his action was brought under federal or state [fol. 51] jurisdiction. We should leave to the proper authority (Court of Errors and Appeals or State Legislature) any corrections of the Chancery Court's decisions that may be deemed advisable. This, we should do without speculation on our part as to what either the Court or the Legislature may do in the future.[4] By so doing, we shall insure that the federal litigant will fare no differently or better than one in the State courts. Instead, however, the decision of the majority will serve to render the New Jersey statute non-uniform in its application and, at the same time, we shall remain powerless to render this court's ruling dominant throughout the State or to change the law there obtaining. The intendment of the decision in Erie R. R. Co.

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[4] The majority infer from the case of Cutts v. Najdrowski, 123 N. J. Eq. 481, 198 Atl. 85, that the Court of Errors and Appeals viewed the "deposit in trust" in that case as a gift inter vivos rather than as a testamentary disposition. That deposit, while in trust, had been in a New York bank. After the depositor's death it had been withdrawn by the beneficiary and, by him, deposited in a bank in New Jersey. The administratrix of the depositor's estate sought to recover the money from the beneficiary in New Jersey as a part of the depositor's estate. The Court of Errors and Appeals decided no more than that the so-called tentative trust (which was valid under the law of New York) was governed by the law of New York (the situs of the trust).

v. Tompkins, supra, makes our duty, in such circumstances, equally evident where the question of local law rests on the construction of a State statute by "a high state court of competent jurisdiction".

Indeed, the statute in the present case "calls for no construction", not because it is "clear and unambiguous", but because it has already been construed by "a high State court of competent jurisdiction".

As both reason and authority seem to me to require that we follow the decisions of the Court of Chancery with respect to the New Jersey statute of 1932, c. 40 and 41, I am [fol. 52] compelled to dissent from the action of the majority, which I do respectfully.

A true Copy:
Teste:

—— ——, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 53] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1939

No. 7055

ETHEL ADELAIDE FIELD, Appellant,

vs.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of Edith M. Peck, Deceased; and United States Savings Bank of Newark, Appellees

Appeal from the District Court of the United States, for the District of New Jersey

This cause came on to be heard on the transcript of record from the District Court of the United States for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby reversed, with costs, with directions to the said District Court

to enter a decree in conformity with the opinion of this court.

Philadelphia, December 20, 1939.

Francis Biddle, Circuit Judge.

Endorsements: Order Reversing Decree, etc. Received & Filed Dec. 20, 1939. Wm. P. Rowland, Clerk.

[fol. 54] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Transcript of Record and proceedings in this Court in the case of Ethel Adelaide Field, Appellant, vs. Fidelity Union Trust Co., et al., Executors of Edith M. Peck, Deceased; et al., Appellees, No. 7055, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 13th day of January in the year of our Lord one thousand nine hundred and forty and of the Independence of the United States the one hundred and sixty-fourth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 22, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
MAR 16 1940
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 32

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND SUPPORTING BRIEF.

FRANCIS F. WELSH,
WALLACE R. CHANDLER, Jr.,
HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.

FRANCIS F. WELSH,
Of Counsel with Petitioners.

Arthur W. Cross, Inc., Law Printers, 71-73 Clinton Street, Newark, N. J.

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Supreme Court of the United States

No..... October Term, 1939.

Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, deceased,
Petitioners,
vs.
Ethel Adelaide Field,
Respondent.

PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, Fidelity Union Trust Company and Minton H. Twinch, as Executors of the Last Will and Testament of Edith M. Peck, deceased, respectfully show:

A.

Summary Statement of the Matter Involved.

The question involved in this case is whether the established decisions of the Court of Chancery of the State of New Jersey, construing the statute law of that State relating to the status of savings bank accounts created in that State and designated in the name of the creator thereof in

trust for another, shall be binding on the Courts of the United States in actions brought in said courts on such accounts.

Edith M. Peck on January 2, 1935 and prior to her death, caused the title of a certain savings bank account (the subject matter of this cause), standing in her name alone, to be transferred upon the records of the savings bank in the City of Newark, New Jersey, to the designation of "Edith M. Peck, in trust for Ethel Adelaide Field" (R. 19) retaining exclusive control over said account with the sole right of withdrawal therefrom, redesignation thereof and right of revocation of any previous disposition (R. 20) and gave no further notice of the existence of or terms of any trust affecting said account (R. 13) and created no other form of alleged trust.

The said Edith M. Peck subsequently died on January 6th, 1935, a resident and citizen of the City of Newark, County of Essex and State of New Jersey, leaving a last will and testament, duly admitted for probate before the Surrogate of said County and State on January 18th, 1935, whereby these petitioners were appointed executors and duly qualified as such. No mention was made in the aforesaid will of the aforesaid savings account nor was the respondent named as a beneficiary therein (R. 27).

Subsequent to the institution of the suit below, the savings bank, which had been named a defendant therein, pursuant to order of the District Court of the United States for the District of New Jersey, caused to be paid into said Court the sum of $4,230.66, being the balance of the said account and upon such payment, was dismissed as a party defendant to the said suit (R. 27).

The said District Court found for these petitioners (R. 24) concluding:

1. That under the law of the State of New Jersey, the designation of the bank account "Edith M. Peck, in trust for Ethel Adelaide Field" did not create a trust in fact.

2. That the designation of the said bank account as aforesaid was in effect testamentary in character and as such did not comply with the statute of wills of the State of New Jersey.

3. That Edith M. Peck did not make a valid gift of the said bank account to the comp' inant, Ethel Adelaide Field.

4. That the complainant, Ethel Adelaide Field, has no right, title or interest in and to the proceeds of said bank account deposited with this Court.

5. That the defendants, Fidelity Union Trust Company and Minton H. Twinch, are entitled to a judgment directing that the amount of said fund deposited in this Court, less lawful disbursements, be paid to them as executors under the last will and testament of Edith M. Peck, deceased.

On December 29, 1938, in conformity with the above conclusions, a judgment was entered by the United States District Court decreeing that the sum of $4,230.66 be paid to the petitioners herein (R. 25).

The respondent (plaintiff below) appealed the judgment of the said District Court to the United States Circuit Court of Appeals for the Third Circuit and said last mentioned Court reversed the judgment of the said District Court on the grounds that the Legislature of New Jersey (Chapter 40, p. 59, P. L. 1932, the full text of which is set

forth in the appendix following the supporting brief hereto) validated the so-called "*tentative trust*" and entitled the beneficiary, in trust for whom the deposit was made, to the funds so deposited upon the death of the creator and in so holding the said Court refused to be bound by or to follow the decisions of the Court of Chancery of the State of New Jersey (*Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid*, 119 N. J. Eq. 416, 182 Atl. 908) in construing such statute to be ineffectual to create such rights in such a beneficiary.

The Order of the Circuit Court of Appeals for the Third Circuit reversing the judgment of the United States District Court for the District of New Jersey was entered on December 20, 1939.

B.

Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was December 20, 1939.

2. The petitioners claim (R. 9, 10 and 11) that, under and by virtue of the local law of the State of New Jersey, the petitioners are entitled to the entire balance of the bank account standing in the name of the decedent and designated "Edith M. Peck, in trust for Ethel Adelaide Field". Respondent asserts that she is the beneficiary named in said bank account and as such became entitled to the same upon the death of Miss Peck.

3. The jurisdiction of the court to issue the writ of *certiorari* herein prayed for is invoked under Judicial Code,

Section 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Section 347).

4. Petitions for writs of *certiorari* to review decisions of the Circuit Court of Appeals for the Third Circuit which have failed to follow the local law of a state have been heretofore granted by this Court. *Erie R. R. Co.* v. *Hilt*, 247 U. S. 97, (1918); *Erie R. R. Co.* v. *Duplak*, 286 U. S. 440.

C.

Reasons relied on for the allowance of the Writ.

1. The decision of the Circuit Court of Appeals for the Third Circuit, construing Chapters 40 and 41 of the New Jersey Laws of 1932, now revised in Revision of 1937 (the complete text of said statutes and the revision thereof being set forth in the appendix following the supporting brief hereto), and holding that, under said statutes, the so-called beneficiary, Ethel Adelaide Field, was entitled, upon the death of the creator of the deposit, to the deposit made by the depositor during her lifetime in trust for such beneficiary, notwithstanding the reservation of complete control over the same by the depositor, is in direct conflict with local decisions of the Courts of New Jersey construing the same statute under parallel facts, to wit: decisions by the Court of Chancery reported in *Thatcher* v. *Trenton Trust Company*, 119 N. J. Eq. 408; *Travers* v. *Reid*, 119 N. J. Eq. 416; and the effect of such decision presents an important question of local law of the State of New Jersey, in so far as it affects numerous bank accounts in this State similar to the one in the instant case.

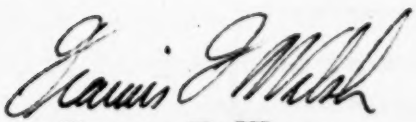
2. The decision of the Circuit Court of Appeals for the Third Circuit in refusing to be bound by or to follow the decisions of the Court of Chancery of New Jersey, is in conflict with Section 34 of the Judiciary Act of 1789, now found in the Judicial Act in 28 U. S. C., Section 725, as construed by the case of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64.

3. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decision of the Court of Chancery of New Jersey is in conflict with the decision of the United States Supreme Court in the case of *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, which reversed the Circuit Court of Appeals for the Third Circuit, which refused to follow a decision of the Supreme Court of New Jersey (*Barcolini* v. *Atlantic City and Shore Railroad Co.*, 82 N. J. L. 107) construing a New Jersey statute. As will appear in our following brief, the Supreme Court of New Jersey and the Court of Chancery are neither courts of last resort, but are of equal importance in the New Jersey judicial system.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court directed to the United States Court of Appeals for the Third Circuit, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a transcript of the record and proceedings herein; and that the judgment of the United States District Court for the District of New Jersey be affirmed by this Honorable Court, and that the order of the United States Circuit Court of Appeals for the Third Circuit be reversed by this Honorable Court, and your petitioners have such other and fur-

ther relief in the premises as to this Honorable Court may seem just and meet.

FRANCIS F. WELSH,
WALLACE R. CHANDLER, JR.,
HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.



FRANCIS F. WELSH,
Of Counsel with Petitioners.

Supreme Court of the United States

OCTOBER TERM, 1939. No.....

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,
Petitioners,
vs.
ETHEL ADELAIDE FIELD,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI.*

I.

Opinions of the Courts below.

The Findings of Fact and Conclusions of Law and Judgment of the District Court were rendered December 29, 1938, and will be found in the Transcript of Record, at pages 23, 24 and 25. There was no accompanying opinion. The opinion of the Circuit Court of Appeals for the Third Circuit was rendered December 20, 1939, and was reported under the title of "*Field* v. *Fidelity Union Trust Company, et al.*" in 108 Fed. 2d, 521, and is set forth in full in the record.

II.

Statement of the Case.

A full statement of the case has heretofore been given under heading A in the petition, and in the interest of brevity the statement will not be repeated in the brief.

III.

Specification of Errors.

The specification of errors is substantially the same as the reasons of the petitioners for the allowance of the writ annexed to the petition and may be condensed as follows:

A. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that the law of the State of New Jersey is the law expressed in the statute of that State as construed by said Court, and that it is not bound to follow decisions of the Court of Chancery of New Jersey in construing said statute.

B. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that under the local law of the State of New Jersey the bank account designated "Edith M. Peck in trust for Ethel Adelaide Field" was in fact a valid trust for the benefit of the beneficiary named therein.

C. The Circuit Court of Appeals for the Third Circuit erred in substituting its construction of the statute in question for that construction adopted by the Court of Chancery of New Jersey.

D. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decisions of the Court of Chancery of New Jersey, is in conflict with that section of the Judiciary Act hitherto cited, as construed by the cases of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202.

E. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decisions of the Court of Chancery of New Jersey, is in conflict with a prior decision of this Court as set forth in the third reason relied upon for the allowance of the writ.

IV.

ARGUMENT.

Summary of the Argument.

POINT A—Under the local law of New Jersey, as established by the Courts prior to 1932, the mere designation of a bank account in trust for another without more confers no rights upon the beneficiary so named.

POINT B.—The 1932 statute of New Jersey did not have the effect of conferring any additional rights upon such a beneficiary.

POINT C—The construction placed by the Court of Chancery of New Jersey upon statutes of that State should be followed by the Courts of the United States.

POINT A.

Under the local law of New Jersey, as established by the Courts prior to 1932, the mere designation of a bank account in trust for another without more confers no rights upon the beneficiary so named.

In New Jersey, the creation of a so-called "tentative trust", which consists of a deposit made by A in trust for B, creates no rights in the beneficiary where the donor or depositor still exercises complete domination or control over the gift. *Stevenson* v. *Earl,* 65 N. J. Eq. 721, Atl. 1091 (E. & A. 1903); *Nicklas* v. *Parker,* 69 N. J. Eq. 743, 61 Atl. 267 (Ch. 1905); *Johnson* v. *Savings Investment & Trust Co. of East Orange, et al.,* 107 N. J. Eq. 547, 153 Atl. 383 (Ch. 1931, aff'd. 110 N. J. Eq. 466, 160 Atl. 371 (E. & A. 1932).

POINT B.

The 1932 statute of New Jersey did not have the effect of conferring any additional rights upon such a beneficiary.

In 1932 Chapters 40, 41, 42 and 43 of the Session Laws were passed by the New Jersey Legislature with reference to deposits in trust. The complete text is found in the appendix at the end hereto, and the same have been condensed by the Revision of 1937 into one inclusive statute, also found in the appendix. Said statutes were considered twice in 1936 by the Court of Chancery of New Jersey in *Thatcher* v. *Trenton Trust Company,* 119 N. J. Eq. 401, 182 Atl. 912 and *Travers* v. *Reid,* 119 N. J. Eq. 416, 182 Atl. 908, and the Court of Chancery in both cases held that the statutes were not applicable. As stated in the majority

opinion of the Circuit Court of Appeals for the Third Circuit in the case *sub judice* "the facts in these two cases cannot be distinguished from those here in question." Both cases held that the statute created no new rights in the so-called beneficiary, and that upon the death of depositor, the deposit vested in the representatives of the estate of the decedent.

POINT C.

The construction placed by the Court of Chancery of New Jersey upon statutes of that State should be followed by the Courts of the United States.

The Supreme Court of the United States, in the case of *Erie Railroad* v. *Tompkins,* 304 U. S. 64, held in construing Section 34 of the Judiciary Act of 1789 (28 U. S. C., Section 725), that it is the law of a state, as declared by the authority of the State, which is binding on a federal court upon a question of local law. This doctrine applies in a suit in equity as well as in actions at law, *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202. The Judiciary Act, *supra,* reads as follows:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The decisions of the Court of Chancery heretofore adverted to have not been reversed, overruled or challenged, and the legislature has not sought to amend, change or modify the statutes of 1932, and it accordingly contended

that under the doctrine of the *Tompkins* case, *supra*, the decisions of the Court of Chancery are authoritative in determining the local law.

The Supreme Court of New Jersey, which is a court of no greater importance than the Court of Chancery of that State, as we will hereafter show, in the case of *Barcolini* v. *Atlantic City & Shore Railroad Co.*, 82 N. J. L. 107, construed a New Jersey statute forbidding recovery to a person injured while walking or playing on any railroad. The Circuit Court of Appeals for the Third Circuit refused to follow this decision in the case of *Erie Railroad Co.* v. *Hilt*, 246 Fed. 800, and the Supreme Court of the United States, in the case of *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, reversed the Circuit Court of Appeals on the ground that the decision of the Supreme Court of New Jersey should be followed by the Courts of the United States, and the Court said:

> "In view of the importance of that tribunal in New Jersey, although not the highest court in the State, we see no reason why it should not be followed by the Courts of the United States, even if we thought its decision more doubtful than we do."

Subsequently, the Supreme Court of the United States, in the case of *Erie Railroad Co.* v. *Duplak*, 286 U. S. 440, reversed the Circuit Court of Appeals for the Third Circuit for failing to follow the ruling of the *Hilt* case and stated that the effect of the Hilt decision was that the construction of a statute by the State Court must be accepted by the Federal Courts.

It is respectfully submitted that the Court of Chancery is of equal importance in the New Jersey judicial structure.

Article VI., Section 1 of the Constitution of New Jersey, provides:

> "The judicial power shall be vested in a court of errors and appeals in the last resort in all causes as heretofore; a court for the trial of impeachments; a court of chancery; a prerogative court; a supreme court; circuit courts, and such inferior courts as now exist, and as may be hereafter ordained and established by law; which inferior courts the legislature may alter or abolish as the public good shall require."

Article VI., Section 2 of the New Jersey Constitution fixes the composition of the highest court of the State, the Court of Errors and Appeals, as follows:

> "The court of errors and appeals shall consist of the chancellor, the justices of the supreme court, and six judges, or a major part of them; which judges are to be appointed for six years."

The *Revised Statutes of New Jersey, 1937 Revision, 2:1-3*, provides:

> "The chancellor, when present, shall be the president of the court; in the absence of the chancellor, the chief justice of the supreme court; in the absence of the chief justice, the senior in office of the justices of the supreme court present."

(Hereafter a reference to the Revised Statutes means the statutes as revised by the 1937 revision.)

Article VI., Section 4 of the Constitution fixes the composition of the Court of Chancery as follows:

> "The court of chancery shall consist of a chancellor."

"The chancellor shall be the ordinary or surrogate-general, and judge of the prerogative court."

Revised Statutes 2:2-3, provides:

"There shall be not more than ten vice-chancellors, who shall be counselors at law of at least ten years' standing. They shall be appointed by the chancellor and commissioned by the governor under the great seal of the state. Each vice-chancellor shall hold office for seven years from the date of his commission."

Revised Statutes 2:2-7, provides:

"The chancellor may refer to a vice-chancellor any cause or other matter at any time pending in the court of chancery, including any matter or cause in which the chancellor is interested, to hear the same for the chancellor, report thereon to him and advise what order or decree should be made therein. The chancellor may also, by general rule, provide for the reference to a vice-chancellor of causes, matters and proceedings pending or future."

For the purpose of comparison, the composition and general powers of the Supreme Court are briefly set forth.

Article VI, Section 5 of the Constitution provides:

"The supreme court shall consist of a chief justice and four associate justices. The number of associate justices may be increased or decreased by law, but shall never be less than two."

"Final judgments in any circuit court may be brought by writ of error into the supreme court, or directly into the court of errors and appeals."

Revised Statutes 2:4-1, provides:

> "*Constitution of court.* The supreme court shall consist of a chief justice and eight associate justices."

The Supreme Court has superintendence of all *inferior* courts, both civil and criminal—*Ludlow* v. *Ex'rs. of Ludlow*, 4 N. J. L. 451; *Whitehead* v. *Gray*, 12 N. J. L. 36 but nowhere is it given superintendence over the Court of Chancery, a court of equal importance.

Appeals from both courts are directed to the Court of Errors and Appeals. *Revised Statutes 2:29-117*, provides:

> "*Persons entitled; orders or decrees appealable.* All persons aggrieved by any order or decree of the court of chancery may appeal therefrom, or any part thereof, to the court of errors and appeals."

Revised Statutes 2:27-350, provides:

> "*Appeals to court of errors and appeals from supreme court.* Appeals from judgments of the supreme court shall be to the court of errors and appeals, except that no appeal shall lie to the court of errors and appeals to reverse a judgment of the supreme court rendered on appeal to that court from the judgment of a circuit court in a contested election case."

The jurisdiction of both the Court of Chancery and the Supreme Court is original and statewide. *Cassatt* v. *First Nat'l. Bk. of West New York* (Supreme Court of N. J.), 9 N. J. Misc. 222, 153 Atl. 337. The equal importance of these two state tribunals is demonstrated by the Court of Errors and Appeals in the case of *Ramsey* v. *Hutchinson*,

117 N. J. L. 222, 187 Atl. 650, in which it stated, (quoting from *Levy* v. *City of Elizabeth*, 81 N. J. L. 643, 80 Atl. 498):

> "Irrespective of the inherent merit of this construction, a ruling uniformly made by the Supreme Court (or the Court of Chancery) over a course of years, should not be set aside by us except for cogent and important reasons."

A brief summary of the foregoing shows that both the Chancellor and the Judges of the Supreme Court form part of the personnel of the Court of Errors and Appeals, the highest court in the State, but the Chancellor is the highest ranking officer in that tribunal. The jurisdiction of both courts is statewide, and while the Court of Chancery has no appellate jurisdiction, the appeals from both courts lie directly in the highest court of the State, which has recognized by judicial statement the importance of the uniform construction made by either court over a course of years.

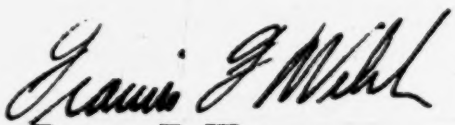
The Vice-Chancellors hear matters on reference from the Chancellor and advise the order or decree to be made. The decree is effective only when entered by the Chancellor.

Inasmuch as the Supreme Court of the United States has held that the Circuit Court of Appeals for the Third Circuit has erred in failing to follow the decisions of the New Jersey Supreme Court in a matter of statutory construction, it is submitted that the Circuit Court of Appeals likewise erred in failing to follow the uniform decisions of the Court of Chancery of New Jersey, a tribunal equal in importance.

The ultimate determination of this matter affects the interests of banks and their depositors throughout the entire state, and it is respectfully submitted that where the decisions of the Court of Chancery construing a State statute have not been challenged for a period of four years, either by other courts in this State, or by the New Jersey Legislature, which has been in regular session each year since that date and has made no attempt to rectify the defects in the 1932 statute, the result of the decision of the Circuit Court of Appeals for the Third Circuit in the case *sub judice* is to effect a discrimination in favor of a nonresident litigant and to create such confusion in the present state of the law as to justify the granting of the petitioner's application for writ of *certiorari*.

Respectfully submitted,

FRANCIS F. WELSH,
WALLACE R. CHANDLER, JR.,
HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.



FRANCIS F. WELSH,
Of Counsel with Petitioners.

APPENDIX.

Chapter 40, New Jersey Session Laws of 1932.

An Act concerning trust deposits in savings banks, trust companies and banks where other than the deposit in trust no other or further notice is given in writing of the existence and terms of the trust.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made with any savings bank, trust company, or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or inter-

est thereon shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 41, New Jersey Session Laws of 1932.

An Act to amend an act entitled "An act concerning savings banks," approved May second, one thousand nine hundred and six.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Section twenty-six of the act of which this act is an amendment is hereby amended to read as follows:

26. When a deposit shall be made by or in the name of any person being a minor, or a female being or thereafter becoming a married woman, the same shall be held for the exclusive right and benefit of such depositor, and free from the control or lien of all persons whatsoever, except creditors, and shall be paid, together with the dividends or interest thereon, to the person in whose name the deposit shall have been made, and the receipt or acquit-

tance of such minor or female shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank; *provided,* no minor shall withdraw any deposit in such minor's name from any account in which the first deposit was actually made by any person other than such minor, without the consent in writing of the person actually making such deposit, or his legal representative, if any, and if none, without the written consent of the natural or legal guardian of such minor.

Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made or to his or her legal representatives, and the legal representatives of the deceased trustees shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for

whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

3. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 42, New Jersey Session Laws of 1932.

A Supplement to "An act concerning banks and banking" (Revision of 1899), approved March twenty-fourth, one thousand eight hundred and ninety-nine.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice

of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided*, that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 43, New Jersey Session Laws of 1932.

An Act to amend an act entitled "A supplement to 'An act concerning trust companies,' (Revision of 1899), approved April eighth, one thousand nine hundred and three."

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was

made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

The four statutes (Chapters 40, 41, 42 and 43 of the Laws of 1932) immediately preceding, were condensed by the 1937 Revision into one statute (17:9-4), which reads as follows:

"*Deposits in trust in banks, savings banks or trust companies.* When a deposit has been or shall be made in a

bank, savings bank or trust company by a person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust has been given in writing to the bank, savings bank or trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the deposit was made, or to his legal representative and the legal representative of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee. If the person for whom the deposit was made is a minor, he shall not draw the deposit during his minority without the written consent of the legal representative of the trustee."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF PETITIONERS.

FRANCIS F. WELSH,
CHARLES DANZIG,
WALLACE R. CHANDLER, JR.,
HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.

FRANCIS F. WELSH,
Of Counsel with Petitioners.

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On Writ of *Certiorari* to the United States Circuit Court of Appeals for the Third Circuit.

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I.

Opinions of the Courts Below.

The Findings of Fact and Conclusions of Law and Judgment of the District Court were rendered December 29, 1938, and will be found in the Transcript of Record, at pages 23, 24 and 25. There was no accompanying opinion. The opinion of the Circuit Court of Appeals for the Third Circuit was rendered December 20, 1939, and was reported under the title of "*Field* v. *Fidelity Union Trust Company, et al.*" in 108 Fed. 2d, 251, and is set forth in full in the record, (R. 29 to 48).

II.

Statement of Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was December 20, 1939. The petition for a writ of *certiorari* was filed March 16, 1940 and granted on April 22, 1940.

2. The petitioners claim (R. 9, 10 and 11) that, under and by virtue of the local law of the State of New Jersey, the petitioners are entitled to the entire balance of the bank account standing in the name of the decedent and designated "Edith M. Peck, in trust for Ethel Adelaide Field." Respondent asserts that she is the beneficiary named in said bank account and as such became entitled to the same upon the death of Miss Peck, (R. 3, 4, 5, 6 and 7).

3. The jurisdiction of the court to issue the writ of *certiorari* herein granted was invoked under Judicial Code, Section 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Section 347).

III.

Statement of the Case.

The question involved in this case is whether the established decisions of the Court of Chancery of the State of New Jersey, construing the statute law of that State relating to the status of savings bank accounts created in that State and designated in the name of the creator thereof in trust for another, shall be binding on the Courts of the

United States in actions brought in those courts on such accounts.

On January 2, 1935, and prior to her death, Edith M. Peck caused the title of a certain savings bank account (the subject matter of this cause), standing in her name alone, to be transferred upon the records of the bank to the designation of "Edith M. Peck, in trust for Ethel Adelaide Field" (R. 19) retaining exclusive control over the account with the sole right of withdrawal therefrom, redesignation thereof and right of revocation of any previous disposition (R. 20) and gave no further notice of the existence of or terms of any trust affecting the account (R. 13) and created no other form of alleged trust.

Edith M. Peck subsequently died on January 6th, 1935, a resident and citizen of the City of Newark, County of Essex and State of New Jersey, leaving a last will and testament, duly admitted for probate before the Surrogate of that County on January 18th, 1935, whereby the petitioners herein were appointed executors and duly qualified as such. No mention was made in the will of the aforesaid savings account nor was the respondent named as a beneficiary therein (R. 27).

Subsequent to the institution of the suit below, the savings bank, which had been named a defendant therein, pursuant to order of the District Court of the United States for the District of New Jersey, caused to be paid into Court the sum of $4,230.66, being the balance of the account and upon such payment, was dismissed as a party defendant to the suit (R. 27).

The District Court found for these petitioners (R. 24) concluding:

1. That under the law of the State of New Jersey, the designation of the bank account "Edith M. Peck, in trust for Ethel Adelaide Field" did not create a trust in fact.

2. That the designation of the said bank account as aforesaid was in effect testamentary in character and as such did not comply with the statute of wills of the State of New Jersey.

3. That Edith M. Peck did not make a valid gift of the said bank account to the complainant, Ethel Adelaide Field.

4. That the complainant, Ethel Adelaide Field, has no right, title or interest in and to the proceeds of said bank account deposited with this Court.

5. That the defendants, Fidelity Union Trust Company and Minton H. Twinch, are entitled to a judgment directing that the amount of said fund deposited in this Court, less lawful disbursements, be paid to them as executors under the last will and testament of Edith M. Peck, deceased.

On December 29, 1938, in conformity with the above conclusions, a judgment was entered by the United States District Court decreeing that the sum of $4,230.66 be paid to the petitioners herein (R. 25).

The respondent (plaintiff below) appealed the judgment of the District Court to the United States Circuit Court of Appeals for the Third Circuit and the latter Court reversed the judgment of the District Court on the

grounds that an act of the Legislature of New Jersey (Chapter 40, p. 59, P. L. 1932, the full text of which is set forth in appendix A hereto) validated the so-called "tentative trust" and entitled the beneficiary for whom the deposit was made, in trust to the funds so deposited upon the death of the creator. In so holding the Court refused to be bound by or to follow the decisions of the Court of Chancery of the State of New Jersey (*Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid,* 119 N. J. Eq. 416, 182 Atl. 908) construing such statute to be ineffectual to create such rights in such a beneficiary, although it conceded that "the facts in these two cases cannot be distinguished from those here in question."

IV.

Specification of Errors.

A. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that the law of the State of New Jersey is the law expressed in the statute of that State as construed by said Court, and that it is not bound to follow decisions of the Court of Chancery of New Jersey in construing said statute.

B. The Circuit Court of Appeals for the Third Circuit erred in finding and holding that under the local law of the State of New Jersey the bank account designated "Edith M. Peck in trust for Ethel Adelaide Field" was in fact a valid trust for the benefit of the beneficiary named therein.

C. The Circuit Court of Appeals for the Third Circuit erred in substituting its construction of the statute in question for that construction adopted by the Court of Chancery of New Jersey.

D. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decisions of the Court of Chancery of New Jersey, is in conflict with section 34 of the Judiciary Act of 1789 (now U. S. C. Title 28, Section 725), as construed by the cases of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 and *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 82 L. Ed. 1330.

E. The decision of the Circuit Court of Appeals for the Third Circuit, in refusing to follow the decision of the Court of Chancery of New Jersey is in conflict with the decision of the United States Supreme Court in the case of *Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 62 L. Ed. 1003, which reversed the Circuit Court of Appeals for the Third Circuit, which refused to follow a decision of the Supreme Court of New Jersey (*Barcolini* v. *Atlantic City and Shore Railroad Co.*, 81 Atl. 494, 82 N. J. L. 107), construing a New Jersey statute. As will appear hereinafter, the Supreme Court of New Jersey and the Court of Chancery are neither courts of last resort, but are of equal importance in the New Jersey judicial system.

V.

The Issue.

The issue involved herein is the narrow one of whether the Federal courts are bound to follow the construction placed upon a New Jersey statute by the Court of Chancery of that State in two independent decisions, or whether they may disregard that construction and arrive at their own conclusions as to the effect of the statute.

VI.

ARGUMENT.

Summary of the Argument.

POINT A—Under the law of the State of New Jersey, the mere designation of a bank account in trust for another is insufficient to constitute a valid gift or a valid declaration of trust.

POINT B—The Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery of New Jersey.

POINT C—The Court of Chancery of New Jersey and the New Jersey Supreme Court are courts of equal rank and importance, both having statewide jurisdiction.

POINT D—In the absence of an authoritative decision of the state court of last resort, Federal courts should be bound by decisions of an important court of statewide jurisdiction.

POINT A.

Under the law of the State of New Jersey, the mere designation of a bank account in trust for another is insufficient to constitute a valid gift or a valid declaration of trust.

The mere designation of the bank account by Edith M. Peck "in trust for Ethel Adelaide Field" did not under the decisions of the highest court of the State of New Jersey create a valid trust entitling the named beneficiary to the fund. There must be some unequivocal act or declaration clearly showing that an absolute gift or trust was intended. *Nicklas* v. *Parker*, 69 N. J. Eq. 743, 61 Atl. 267, affirmed 71 N. J. Eq. 777, 71 Atl. 1135; *Johnson* v. *Savings Investment & Trust Co.*, 107 N. J. Eq. 547, 153 Atl. 383, affirmed 110 N. J. Eq. 466, 160 Atl. 371. In 1932 the legislature passed four statutes, P. L. 1932, Ch. 40, 41, 42 and 43 each in similar language, purporting to deal with tentative trusts. (The text appears in appendix A hereto p. 28). These statutes were construed by the Court of Chancery of New Jersey in *Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, 182 Atl. 912, and *Travers* v. *Reid*, 119 N. J. Eq. 416, 182 Atl. 908, as ineffective to change the prior rules of law on this subject or to alter the legal requirements of either a gift *inter vivos*, or a valid trust. It is of some significance and adds to the importance of the decisions that the *Thatcher* and *Travers* cases were decided by two different Vice-Chancellors who reached the same result as to the 1932 act independently of the other. *Travers* v. *Reid, supra*, note at page 423. Since these two decisions the Court of Errors and Appeals has dealt with the problem of tentative trusts in

Cutts v. *Najdrowski*, 123 N. J. Eq. 481, 198 Atl. 885, and *Trust Co. of New Jersey* v. *Farawell*, 127 N. J. Eq. 45, 11 Atl. (2nd) 98, but has said nothing in either case bearing on the statutory law. The factual situation in the last two cited cases was such as to require no application of the statute in question.

Subsequent to the decision of the *Thatcher* and *Travers* cases the New Jersey legislature enacted a revision of the Laws of New Jersey in 1937. The 1932 Statutes in question appear as one statute as R. S. 17:9-4 of the Revision of 1937 (appendix B hereof, p. 34) without any change in language except as to the last sentence which in the 1932 Act appeared in the form of a proviso, but in the 1937 revision appears without such proviso. In no way is the sense or substance of the 1932 Act changed in the revision. *Crater* v. *Somerset County*, 123 N. J. L. 407, 8 Atl. (2nd) 691.

The adoption of the revision of 1937 has been held to be a re-enactment of the statutory law of a general nature as well as a revision superseding all such statutory law. *Devlin* v. *Cooper*, 124 N. J. L. 155, 11 Atl. (2nd) 29; *State* v. *Czarnicki*, 124 N. J. L. 43, 10 Atl. (2nd) 461. In *Ross* v. *Miller*, 115 N. J. L. 61, 178 Atl. 771, the Court quoting from Lewis' Sutherland Statutory Construction § 499 stated, at page 64-65: "The re-enacting of a statute after a judicial construction of its meaning is to be regarded as a legislative adoption of the statute as thus construed. So, where the terms of a statute which has received a judicial construction are used in a later statute, * * * that construction is to be given to the later statute; for if it were intended to exclude any known construction of a previous statute,

the legal presumption is that its terms would be so changed as to effectuate that intention". Accord: *Lynch* v. *Long Branch,* 111 N. J. L. 147, 167 Atl. 664; *Cook* v. *Bennett Gravel Co.* 90 N. J. L. 9, 100 Atl. 331. And such is the rule even though the construction of the statute was by an inferior court. *Bakelite Corporation* v. *National Aniline & Chemical Co.* 83 Fed. 2d. 176. Furthermore, the construction of the statute determined by the Court of Chancery has not been challenged in any other court in the State of New Jersey.

Although the Court of Chancery had construed the 1932 statute in 1936 in the *Thatcher* and *Travers* cases and such construction was adopted by the legislature by the enactment of the Revised Statutes in 1937, the Circuit Court of Appeals of the Third Circuit, conceding that "the facts in these two cases cannot be distinguished from those here in question", refused to follow these two cases on the ground that the Court of Chancery is not the "highest Court" of the State of New Jersey. Where a state statute has been construed by a competent court of statewide jurisdiction and such construction has been adopted by the legislature by re-enactment of the statute in question, it is submitted that it is not within the province of the Federal courts to make an independent determination of the law, and incidentally to pass judgment upon the merit of decisions of the State court on the same subject. It certainly cannot be said that the conclusions of the Court of Chancery as to the effect of the New Jersey statute under consideration were so erroneous as to warrant their abrupt rejection by the Circuit Court of Appeals. In fact, there is considerable justification in the construction arrived at by the Vice-Chancellors. Without deeming it necessary or

expedient to make an exhaustive analysis of the statutory text, we invite attention to that part of the act (Appendix A, page 28), which provides that where a deposit shall be made, etc.; and "no other or further notice of the existence of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank in the event of the death of the trustee"—the deposit shall be paid to the person in trust for whom said deposit was made, etc. As was pointed out in the *Thatcher* and *Travers* cases, *supra,* the operation of the statute is predicated upon the existence of a *legal* and *valid* trust. Under the New Jersey common law, a deposit made by A in trust for B, where A retains complete control and domination, does not create a valid trust, or in fact, any trust. The statutory law on the subject has not changed the common law.

POINT B.

The Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery of New Jersey.

Whatever may have been the power of a Federal Court to apply its own conception of the Common Law of a State in cases where jurisdiction rested solely on diversity of citizenship the Federal Courts since *Erie R. R.* v. *Tompkins* must now (as said by Mr. Justice Reed in *Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202, 82 L. Ed. 1290, "search for and apply the entire body of substantive law governing an identical action in the state courts." Cf. *Rosenthal* v. *N. Y. Life Ins.*, 304 U. S. 263, 82 L. Ed. 1330.

As was said by Mr. Justice Holmes in his dissent in *Kuhn* v. *Fairmount,* 215 U. S. 349, at page 372, 54 L. Ed. 228, at page 239: "The law of a state does not become something outside of the state court, and independent of it by being called the common law. Whatever it is called, it is the law as declared by the state judges and nothing else", and quoting Mr. Justice Miller in *Brine* v. *Hartford Fire Ins.,* 96 U. S. 627, 24 L. Ed. 858, he says: "To administer a different law is to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other with no superior to decide which is right."

That the state law has not been declared by the highest court does not make it any the less the law so far as citizens of the state are concerned. If we are correct in our belief that the *Tompkins* and *Ruhlin* cases transmute the Federal courts into state courts *pro hac vice* where no federal question is involved then the fact that the highest court has not spoken is no excuse for a departure from the doctrine of *stare decisis.* Indeed in the *Ruhlin* case it appeared that there was no decision on the point by the highest court of Pennsylvania but only one by an intermediate appellate tribunal. And this court stated in the *Ruhlin* case that the Federal courts in determining the state law must broaden their inquiry "to include the decisions of the state courts, just as they would in a case tried in the state court, and just as they have always done in actions brought in the Federal courts involving what were known as matters of 'local' law."

In conformity with the foregoing mandate Judge Clark in the case *sub judice* in the District Court for the District

of New Jersey found as part of the conclusions of law as follows: "1. That under the law of the State of New Jersey, the designation of the bank account 'Edith M. Peck, in trust for Ethel Adelaide Field' did not create a trust in fact" (R. p. 24).

It is submitted that what this court said in the *Tompkins* and *Ruhlin* cases is just as applicable to the Federal courts when a question of statutory construction is concerned. Indeed, prior to these decisions this court did not reject the construction of a state statute because the construction was not by the highest court in the State.[1]

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[1] See also, following the New Jersey Supreme Court, *Masino* v. *West Jersey & S. S. R. Co.*, 41 Fed. 2d 646, (CCA, 3d, 1930); *Murray* v. *Payne*, 273 Fed. 820 (CCA, 3d, 1921); *Island Development Co.* v. *McGeorge*, 26 Fed. 2d 841, (CCA, 3d, 1928), certiorari denied 278 U. S. 642; cf; *Dorrance* v. *Martin*, 12 Fed. Supp. 746 (Dist. Ct. D. New Jersey, 1935) affirmed 296 U. S. 393; and, following the Pennsylvania Superior Courts (not the highest court of Pennsylvania) *Taplinger* v. *Northwestern National Bank*, 101 Fed. 2d 274 (CCA, 3d, 1938); *Berlet* v. *Lehigh Valley Silk Mills*, 287 Fed. 769 (CCA, 3d, 1923); cf; *Steinbach* v. *Metzger*, 63 Fed. 2d, (CCA, 3d, 1933).

Further in *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, (1937) Mr. Chief Justice Hughes said at page 10: "The decision of the state court upon these questions is final * * *. It matters not that the decision was by an intermediate appellate court"; and in *Ruhlin* v. *New York Life Ins. Co.*, 304 U. S. 202, (1938) the cause was remanded to the District Court to determine the state law, whereupon, in *New York Life Ins. Co.* v. *Ruhlin*, 25 Fed. Supp. 65, (Dist. Ct. W. D. Pennsylvania, 1938) affirmed 106 Fed. 2d 65,

Thus in *Erie R. R.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, it appears that the District Court for the District of New Jersey refused to follow the construction placed upon a statute by the New Jersey Supreme Court in *Barcolini* v. *Atlantic City & Shore R. Co.,* 82 N. J. L. 107, 81 Atl. 494, and rendered judgment for the plaintiffs which judgment was affirmed by the United States Circuit Court of Appeals for the Third Circuit. In reversing the judgment, Mr. Justice Holmes stated for this Court at pages 100-101: "The words of the Statute seem to us to require a different

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certiorari denied 84 Lawyers Ed. 417, rehearing denied 84 L. Ed. 532, the law of Pennsylvania was found to be established by a decision of that state's Superior Court "even though it may have been by an intermediate court of appeals", 25 Fed. Supp. 65 at 69.

In many other cases, decisions of courts lower than the highest court of the state have been followed; *In re Gilligan,* 152 Fed. 605 (CCA, 7th, 1906), certiorari denied 206 U. S. 563—Appellate Court of Indiana; American Optometer's Ass'n. *v.* Ritholz, 101 Fed. 2d 883, (CCA 7th, 1939), certiorari denied 307 U. S. 647—Illinois Appellate Court; Delaware and Hudson R. Corp. *v.* Bonzih, 105 Fed. 2d 541 (CCA, 3d, 1939)—Pennsylvania Superior and Supreme Courts; *In re Wicgand,* 27 Fed. Supp. 725, (Dist. Ct. S. D. California, 1939)—Appellate Department of the Superior Court of California; Gallagher *v.* Florida East Coast Ry., 196 Fed. 1000, (Dist. Ct. S. D. New York, 1912)—Appellate Division, New York Supreme Court. See also *Tipton* v. *Atchison, Topeka & Santa Fe R. R.,* 298 U. S. 141 (1936) wherein two decisions of District Courts of Appeal of California would have been followed had they only enunciated state law; but they were rejected for misconstruing a federal statute.

construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger that the plaintiff. *Barcolini* v. *Atlantic City & S. R. Co.*, 82 N. J. L. 107, 81 Atl. 494. In view of the importance of that tribunal in New Jersey, although not the highest court in the state, we see no reason why it should not be followed by the courts of the United States even if we thought its decision more doubtful than we do." That the ground of decision in the *Hilt* case was the lack of power of the lower Federal courts to disregard the construction of a State Statute by a state court not the highest court must be inferred from the fact that Mr. Justice Day and Mr. Justice Clarke dissented on the sole ground that in the absence of a decision by the highest court of New Jersey holding otherwise, the Circuit Court was right in holding the Statute inapplicable.

In a later case involving the same statute *Erie Railroad Co.* v. *Duplak,* 286 U. S. 440 (1932), 76 L. Ed. 1214, Mr. Justice Sutherland said (p. 443):

> "However, the point is settled by the state law and effectually disposed of by the Hilt case."

The Circuit Court of Appeals for the Third Circuit (from whose decision the instant appeal is taken) has often followed the rule of the Hilt case:

Thus in *North Philadelphia Trust Co.* v. *Smith,* 13 Fed. 2d 585 (CCA, 3d, 1926), on error to the trial court in admitting a promissory note in evidence under New Jersey Supreme Court decisions, Circuit Judge Woolley said at page 586:

> "This was a decision of the Supreme Court of New Jersey, not by the Court of Errors and Appeals. That court, however, though not the highest court of the state, is, in the estimation of the Supreme Court of the United States, as shown in Erie *v.* Hilt, of such standing as to compel the courts of the United States to follow its pronouncements."

Indeed the Third Circuit has followed the Court of Chancery of New Jersey under the rule of the *Hilt* case in no less than three cases: *Greiman* v. *Metropolitan Life Ins. Co.*, 96 Fed. 2d 685 (CCA, 3d, 1938); *ex parte Zwillman*, 48 Fed. 78 (CCA, 3d, 1931), appeal dismissed 144 U. S. 310, the Circuit Court of Appeals followed the New Jersey Supreme Court whose decision was based on an opinion of the New Jersey Court of Chancery; and *Radin* v. *Commissioner of Internal Revenue*, 33 Fed. 2d, 39 (CCA, 3d, 1929), Circuit Judge Wooley saying at page 40:

> "But as the Court of Chancery of New Jersey has, we think, decided that this specific asset was real estate (the one fact omitted from the statement), there was no occasion for the Commissioner to consider and there is no warrant for this court to decide the question. The matter has been decided by a high state court of competent jurisdiction whose decision, involving a rule of property, federal tribunals must follow. De Vaugh *v.* Hutchinson, 165 U. S. 566, 570, 17 S. Ct. 461, 41 L. Ed. 827; Erie R. Co. *v.* Hilt, 247 U. S. 97, 100, 101, 38 S. Ct. 435, 62 L. Ed. 1003."

In its opinion below (R. 35) the Circuit Court distinguished this case on the ground that the Court of Chancery's decision constituted the question *res adjudicata*, but the opinion shows this not to have been the *ratio dec-*

idendi but rather the acceptance of the decision of the Court of Chancery as the law of the state. This is attested by its citation of the *De Vaugh* and *Hilt* cases, *supra.*

The rulings of the Court of Chancery of New Jersey carries equal weight with that of the New Jersey Supreme Court in the eyes of the Court of Errors and Appeals of New Jersey. Thus in *Ramsay* v. *Hutchinson,* 117 N. J. L. 222, 187 Atl. 650, the Court of Errors and Appeals in following a construction placed upon the Statute of Limitation by the Court of Chancery stated: "Irespective of the inherent merit of this construction a ruling uniformly made by the Supreme Court (or the Court of Chancery) over a course of years should not be set aside by us except for cogent and important reasons". (That the Court of Chancery is an important court in the New Jersey judicial system exercising state-wide jurisdiction with decrees appealable only to the Court of Errors and Appeals, the court of last resort, is more fully presented under Point C p. 19 *infra*).

Unless the Federal courts are bound to apply the construction of the Court of Chancery to the facts of this case, the abolition of inequality between a citizen of the State of New Jersey and a non-citizen in a Federal Court intended by the *Tompkins* case will not be fully achieved. As Circuit Court Judge Jones said in his dissenting opinion below (R. p. 47):

> "Concurrently with the decision of the majority, and growing out of the same New Jersey statute, there will be one rule of law for resident claimants who are committed to the courts of New Jersey, and a different rule for such non-resident claimants as

can, by reason of the mere accident of diverse citizenship and amount in controversy, invoke federal jurisdiction for the enforcement of their equally private and local claims. On the other hand, if we would but follow the decisions of the Chancery Court with respect to the particular statute here involved, it could make no difference from the standpoint of a claimant's rights whether his action was brought under federal or state jurisdiction. We should leave to the proper authority (Court of Errors and Appeals or State Legislature) any corrections of the Chancery Court's decisions that may be deemed advisable. This, we should do without speculation on our part as to what either the Court or the Legislature may do in the future. By so doing, we shall insure that the federal litigant will fare no differently or better than one in the State courts. Instead, however, the decision of the majority will serve to render the New Jersey statute non-uniform in its application, and, at the same time, we shall remain powerless to render this court's ruling dominant throughout the State or to change the law there obtaining. The intendment of the decision in Erie R. R. Co. *v.* Tompkins, *supra,* makes our duty, in such circumstances, equally evident where the question of local law rests on the construction of a State statute by a high state court of competent jurisdiction."

And again, (R. 46):

"Moreover, the decision of the majority leads directly to the situation where a statute of New Jersey when construed in chancery can never become the law of the State, so as to be binding on a federal court, until it has been passed upon and affirmed by the Court of Errors and Appeals, while the same statute when construed at law (Supreme Court of

New Jersey) will bind us, without utterance from the Court of Errors and Appeals, even though the decision is later taken to the latter court for review and there reversed. This resultant anomaly, of itself, argues strongly for our acceptance of the decisions of the Court of Chancery of New Jersey equally with the decisions of the Supreme Court of that State."

POINT C.

The Court of Chancery of New Jersey and the New Jersey Supreme Court are courts of equal rank and importance, both having statewide jurisdiction.

Since it has been uniformly held that the Courts of the United States are compelled to observe the decisions of the Supreme Court of New Jersey construing the statutes of that state as being declaratory of the law of that State (*Erie R. R.* v. *Hilt, supra; Erie Railroad Co.* v. *Duplak, supra;* and *North Philadelphia Trust Co.* v. *Smith, supra*), it necessarily follows that the decision of the Circuit Court of Appeals for the Third Circuit in the case under review, which, in effect, ignored the decisions of the Court of Chancery of New Jersey likewise construing a statute of that state, must be based on the reasoning that the Court of Chancery of New Jersey is not of equal rank or importance with the New Jersey Supreme Court. Such reasoning is patently erroneous.

In order to ascertain the importance of the Court of Chancery of New Jersey, it is proper to examine the history of the creation of that court. Originally, in 1705, Lord

Cornbury, by virtue of his commission as governor, established a court of chancery in which he and his council were to preside, and were "to hear and determine all causes and suits in said court which, from time to time, shall come before them, in such manner or as near as may be, according to the usage or custom of the high court of chancery, in the kingdom of England." This establishment continued in force until March 28th, 1770, when Governor Franklin, by virtue of his commission, in 1762, constituted himself chancellor and judge of the high court of chancery or equity of New Jersey. Governor Franklin continued in office until the first constitution of New Jersey was formed—July 2nd, 1776—and a few months after that event, on the 7th of October, 1776, the state legislature enacted that the several courts of law and equity of New Jersey, shall be confirmed and established, and continue to be held with the like powers under the present government as they were held at and before the Declaration of Independence.

During this formative period, and for a short time subsequent, the decrees of the court of chancery were not appealable, the power of the court of errors and appeals then being applicable alone to actions in the courts of common law. The court of chancery remained a court of last resort until the revision of 1799, when an appeal from the Court of Chancery was first permitted.

Penna. R. R. Co. v. *Nat. Docks Ry. Co.*, 54 N. J. E. 652;

In re appointment of Vice-Chancellors, 105 N. J. Eq. 759, 148 Atl. 750;

Appendix, 19 N. J. Eq. 577, 583.

In 1844, the present constitution of New Jersey was adopted and, under its provisions, appeals as a matter of right are now allowed from Chancery to the Court of Errors and Appeals, R. S. 2:29-117. Appeals from the Supreme Court are also directly to the Court of Errors and Appeals, R. S. 2:27-350. The constitution of 1844 established the judicial powers as follows:

"ARTICLE VI.

JUDICIARY.

Section I.

1. The judicial power shall be vested in a Court of Errors and Appeals in the last resort in all causes as heretofore; a Court for the trial of impeachments; a Court of Chancery; a Prerogative Court; a Supreme Court; Circuit Courts, and such *inferior* courts as now exist, and may be hereafter ordained and established by law; which *inferior* Courts the Legislature may alter or abolish, as the public good shall require. (Italics supplied.)

Section II.

1. The Court of Errors and Appeals shall consist of the Chancellor, the Justices of the Supreme Court, and six judges, or a major part of them; which judges are to be appointed for six years.

Section IV.

1. The Court of Chancery shall consist of a Chancellor.

2. The Chancellor shall be the Ordinary or Surrogate General, and judge of the Prerogative Court."

The demands of litigation upon the Chancellor resulted in expansion of the court as outlined by Chancellor Magie in *Gregory* v. *Gregory*, 67 N. J. Eq. 7, at pages 10-11, where he stated:

> "The introduction of Vice-Chancellors into our system of chancery jurisprudence arose from legislation based on the ancient right of the chancellor to call upon the masters of his court for their advice as to his action in causes and proceedings pending before him. When that legislation was first adopted, the business of the court had outgrown the power of the chancellor to dispose of it alone. For the purpose of enabling the court to deal with the increasing business therein, the legislature gave authority to the chancellor to appoint an officer, to be called a vice-chancellor, to whom he might refer causes for trial, and who might try the causes thus referred upon evidence orally taken, and was required to report to the chancellor his opinion and advise what decree should be made therein. As the business of the court still further increased the legislature, with wise liberality, from time to time has authorized the appointment of additional vice-chancellors, and by this system the court of chancery has practically been enabled to keep pace with its business. * * * The legislation on this subject has not attempted to deprive and it could not constitutionally deprive the Chancellor of his right to make the decrees of his court."

The judicial powers of the Vice-Chancellors are derived solely from the court and not from the legislature. *In re Appointment of Vice-Chancellors, supra.* And not only is the opinion of one vice-chancellor binding on all vice-chancellors, *Philadelphia and Camden Ferry Co.* v. *Johnson*, 94

N. J. Eq. 296, 297, but the Court of Errors and Appeals gives the same weight to the construction of a statute by the Court of Chancery as it does to a construction by the Supreme Court. *Ramsey* v. *Hutchinson, supra.*

It will be noted from the above that, under the Constitution of New Jersey, the Court of Chancery is clearly of equal importance with the State Supreme Court. As a matter of fact, when the various courts are referred to, the Court of Chancery is first mentioned next to the Court of Errors and Appeals (the court of last resort), and then the Supreme Court is mentioned. Both courts are of statewide original jurisdiction (*Cassatt* v. *First Nat'l. Bk. of West New York,* 9 N. J. Misc. 222, 153 Atl. 377). The Justices of the Supreme Court and the Chancellor both sit on the Court of Errors and Appeals, but *the Chancellor is the president of the Court of Errors and Appeals.* R. S. 2:1-3.

Even as to smaller details it clearly appears that both courts are equal. The terms of the justices of the Supreme Court and those of vice-chancellors are equal. The salaries are equal (the Chancellor and Chief Justice each receive $19,000.00, R. S. 2:2-2 and 2:4-3; the Vice-Chancellors and Associate Justices of the Supreme Court each receive $18,000.00 under R. S. 2:2-5 and 2:4-3). The statute law, referring to the Administration of Civil and Criminal Justice and to the Courts of New Jersey (R. S. Title 2) first treats of the Court of Errors and Appeals (Chapter 1), next the Court of Chancery (Chapter 2), next the Prerogative Court over which the chancellor presides as Ordinary (Chapter 3), next the Supreme Court (Chapter 4) and then in following chapters the various inferior courts.

Although, as stated in *Ludlow* v. *Ex'rs. of Ludlow,* 4 N. J. L. 451 and in *Whitehead* v. *Gray,* 12 N. J. L. 36, the Supreme Court has the superintendence of all *inferior* courts both civil and criminal, nowhere is it given superintendence over the Court of Chancery, nor has it ever attempted to assert such superintendence. Its jurisdiction is limited to law actions while the Court of Chancery is created as a court of equity. The decrees of the Chancery Court like the judgments of the Supreme Court are state-wide in effect and are appealable only to the Court of Errors and Appeals. There is no intermediate court of appeal empowered to review the decision of either.

POINT D.

In the absence of an authoritative decision by a state court of the last resort, the federal courts should be bound by the decisions of an important court of statewide jurisdiction.

It is not contended that the Federal courts are bound to follow the decisions of every state court, regardless of its importance in the judicial hierarchy or the extent of its areal jurisdiction. Obviously, such requirement would lead to absurd results.

What then, is the criterion? It is respectfully submitted that the decisions of an important state court whose jurisdiction is statewide may not, in the absence of an expression of the highest court, be disregarded; such decisions make "state law". The decisions of the state courts having less than statewide jurisdiction, are binding only upon the residents within their limited geographical area.

Such courts do not make "state law" and other state courts of like importance need not follow such decisions under the doctrine of *stare decisis;* such significance that they may attach to decisions of their neighboring tribunals is based simply upon principles of comity; there are numerous instances of sharp conflict.

Federal courts, charged with a duty to ascertain a state law, need not give greater weight to decisions of a local court than other courts in the same state but outside its territorial jurisdiction would accord, and are free to make an independent determination of the state law in the same manner and subject to the same limitations as such other state courts.

This distinction was suggested in the note in *Volume 53 of the Harvard Law Review, Number 5, page 880.* In this note, the Federal authorities have been collected to the effect that decisions of state courts of less than statewide jurisdiction have been disregarded, but that, where the jurisdiction is statewide, their decisions have usually been followed, although it is conceded that the Federal courts do not consciously make such distinction.

The independent determination of the state law by a Federal court, where the only local decisions are from courts of less than statewide jurisdiction, does not *ipso facto* give a non-resident advantage over the citizen, but where the jurisdiction of an important state court, such as the Court of Chancery of New Jersey, is statewide, its determination as to the prevailing state law is controlling and should be followed by Federal courts, particularly where its decisions have not been challenged for a period

of four years by any other court in the state and where the legislature, which has been in regular session each year thereafter, has made no attempt to modify or amend the statute in question as construed by the Court of Chancery, but instead re-enacted it.

The decisions of the Court of Chancery have become established as an essential part of the New Jersey jurisprudence and will so remain until altered by legislative enactment or reversed or overruled by the Court of Errors and Appeals. Until, however, any of the last mentioned events occur, those decisions are the law of the state. A non-resident suing in a Federal Court should not have the benefit of any different rule of law.

In the dissenting opinion of Mr. Justice Field in the case of *Baltimore and Ohio Railroad Company* v. *Baugh*, 149 U. S. 368, which was cited and quoted with approval by the United States Supreme Court in the case of *Erie Railroad* v. *Tompkins, supra*, there is the following statement at page 404:

> "In *Shelby* v. *Guy*, 24 U. S. 11 Wheat, 362, 365 (6:495, 496), this court, in considering the meaning to be given to the words 'beyond the seas', in a statute of limitations of Tennessee, said: 'That the statute laws of the states must furnish the rule of decision to this court so far as they comport with the Constitution of the United States in all cases arising within the respective states, is a position that no one doubts. Nor is it questionable that a fixed and received construction of their respective statute laws, in their own courts, makes, in fact, a part of the statute law of the country, however we may doubt the propriety of that construction. It is obvious that this

> admission may, at times, involve us in seeming inconsistencies, as, where states have adopted the same statutes and their courts differ in the construction. Yet that course is necessarily indicated *by the duty imposed on us to administer, as between certain individuals, the laws of the respective states, according to the best lights we possess of what those laws are'.*"

The italics are those of the opinion, but are re-emphasized in this brief.

As stated in the quotation, it is a duty of the Federal court to ascertain and administer the statutory construction according to the best lights it may possess as to what such construction may be. Where the statute has received a construction by an important state court which has become fixed by the efflux of time, such construction may not be disregarded by the Federal courts.

It is therefore respectfully submitted that the Circuit Court of Appeals for the Third Circuit erred in the case *sub judice* in refusing to follow the decisions of the Court of Chancery of New Jersey construing a purely local statute of that state and that the judgment of the Circuit Court of Appeals for the Third Circuit should be reversed and that of the District Court for the District of New Jersey approved.

Respectfully submitted,

FRANCIS F. WELSH,
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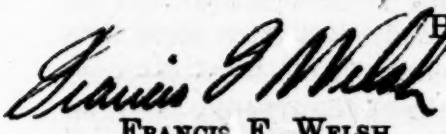

FRANCIS F. WELSH,
Of Counsel with Petitioners.

tance of such minor or female shall be a valid and sufficient release and discharge for such deposit, or any part thereof, to the bank; *provided,* no minor shall withdraw any deposit in such minor's name from any account in which the first deposit was actually made by any person other than such minor, without the consent in writing of the person actually making such deposit, or his legal representative, if any, and if none, without the written consent of the natural or legal guardian of such minor.

Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made or to his or her legal representatives and the legal representatives of the deceased trustees shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for

whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

3. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 42, New Jersey Session Laws of 1932.

A Supplement to "An act concerning banks and banking" (Revision of 1899), approved March twenty-fourth, one thousand eight hundred and ninety-nine.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice

of the existence and terms of a legal and valid trust shall have been given in writing to the bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

Chapter 43, New Jersey Session Laws of 1932.

An Act to amend an act entitled "A supplement to 'An act concerning trust companies' (Revision of 1899), approved April eighth, one thousand nine hundred and three."

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. Whenever any deposit shall be made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be

paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

2. Whenever any deposit shall have been made by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided,* that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

3. If any part of this act is held to be unconstitutional it shall not affect the validity of the remainder thereof.

4. This act shall take effect immediately.

Approved March 28, 1932.

APPENDIX B.

New Jersey Revision of 1937; Title 17, Chapter 9, Section 4.

"*Deposits in trust in banks, savings banks or trust companies.* When a deposit has been or shall be made in a bank, savings bank or trust company by a person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust has been given in writing to the bank, savings bank or trust company, in the event of the death of the trustee, the same or any part thereof together with the dividends or interest thereon, shall be paid to the person in trust for whom the deposit was made, or to his legal representative and the legal representative of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee. If the person for whom the deposit was made is a minor, he shall not draw the deposit during his minority without the written consent of the legal representative of the trustee."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 32

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

v.

ETHEL ADELAIDE FIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

FRANCIS F. WELSH,
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WALLACE R. CHANDLER, JR.,
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ETHEL ADELAIDE FIELD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

PETITIONER'S REPLY BRIEF.

Counsel for the respondent has stated (Respondent's brief, p. 5) that tentative trusts have been found socially desirable by many states and have been generally accepted and cites *Restatement of the Law of Trusts* as his authority. It is respectfully submitted that the courts of New Jersey are not bound by decisions of sister states in determining the legal effect to be placed upon such so-called trusts locally in New Jersey.

Inasmuch as the respondent has devoted a considerable portion of her brief to attacking the decisions of *Thatcher* v. *Trenton Trust Co.*, 119 N. J. Eq. 408, and *Travers* v.

Reid, 119 N. J. Eq. ~~406~~ 416, which have established the law of New Jersey as to the so-called tentative trusts, it is appropriate to consider these decisions a little more fully.

The respondent, in her brief, speaks of these cases as having nullified the New Jersey statutes in question concerning trust deposits (The statutes are set forth in full in Appendix A of petitioner's original brief, page 28 *et seq.*). An examination of the text of both decisions, however, shows that the issue before the Vice Chancellors was not the validity of the statute in question, but its construction, and more particularly whether the statutory text was such as to make it applicable to the facts in the case before them. As Vice Chancellor Buchanan said in *Thatcher* v. *Trenton Trust Co., supra,* at the bottom of page 415:

> "For the reasons herein set forth in its concluded that the statute of 1932 is inoperative,—certainly so far as the instant case is concerned,—to change the law applicable to the facts herein as hereinbefore mentioned; and that the claimant has not proved his claim to the funds in question."

It is true that in both cases constitutional objections were hinted at, but in each case the court disclaimed such objections as being the *ratio decidendi.*

Under the New Jersey common law, a deposit made to the credit of A, but entitled "A in trust for B", where A retains all the attributes of ownership and domination, including the right to make subsequent deposits and to withdraw the same, and where no control is lodged with B during his lifetime, is testamentary in character and not being in accordance with the New Jersey Statute of Wills, it cannot be given effect; nor is such a deposit a gift, since there is neither a presently effective donative intent nor a delivery of the subject matter of the gift, either symbolic or

otherwise. This was established by the cases cited in the petitioner's original brief.

The Vice Chancellors were confronted with a problem as to whether the basic rule of New Jersey was, under the particular facts, changed or modified by the statute in question. As Vice Chancellor Buchanan (*Thatcher* v. *Trenton Trust Co., supra,* at page 413) said, consideration of the first part of the act, and giving to the words used their natural and ordinary meaning, would lead to the conclusion that the statute referred to, and was intended to apply to, instances where there had been created a valid trust in the bank credit. The statute reads "whenever any deposit shall be made * * * in trust for another", not "whenever any deposit shall be made to the credit of one person in trust for another." A deposit is not, in fact, made under New Jersey law in trust for another unless a valid trust has been intended and created. As to the instant case, no valid trust was created. A statute which refers to and applies only to the instance where a valid trust has already been created, cannot affect the instant case. The opinion then quotes certain parts of the statute in question, all of which leads to the inescapable conclusion that the statute does not apply to factual situations of the kind under review, and was not so intended by the legislature.

The respondent, on page 10 of her brief, suggested that to remove from the operation of the statute cases similar to those *sub judice* would render it meaningless. This does not follow; it provides for the method of disposition when the elements of a valid trust exist, but no more notice than appears in the designation of the account is given to the depository.

In the case of *Travers* v. *Reid, supra,* Vice Chancellor Berry, at page 422, arrived at the same conclusion that the

statute necessarily presupposes the existence of the elements of a legal and valid trust, and in the case before him, none of those elements, tested by New Jersey law, existed, and the statute does not apply. The assumption that the legislative intent was overruled by the construction given to the statutes in the Court of Chancery is based on erroneous conclusions. Whatever the legislature may have intended to have been included within the scope of the statute, there is nothing to indicate that the statute was to control in situations similar to the case cited or the case *sub judice,* where the facts were parallel. Nor did the Vice Chancellor violate any canon of construction applied by the New Jersey courts, as respondent urges at pages 9 and 11 of her brief. In *Ott* v. *Braddock,* 119 N. J. L. 507, 197 Atl. 271, cited at pages 9 and 10 of respondent's brief, the canon of construction involved pertained to the sufficiency of the title of the act as an expression of its object, as required by the New Jersey Constitution and not the constitutionality of the body of the statute itself.

It would be ridiculous to contend that the decisions of the Court of Chancery are binding upon the Court of Errors and Appeals, which is the court of last resort, but the fact that decisions of an important state court are subject to review by a final court, does not impair the power of the court to determine and make state law. Their decisions will establish and settle the law until they are reversed or overruled, or until the legislature should see fit to make a change, and, in fact, this is the contingent fate of the decisions of all state courts, whether final or otherwise. We agree with the respondent that the doctrine of *stare decisis* is not a mere mechanical formula of adherence to the latest decision, but it is not for the Federal courts to determine in matters of local law when social, economical or

political policies require a departure. In fact, it was the insistence of Federal courts of their right to assert this prerogative that led to the doctrine established by this court in the case of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188.

We now advert to the statement on page 11 of the respondent's brief that decisions of the Court of Chancery are not binding upon the Supreme Court of New Jersey. As the courts are both of equal importance in the judicial structure, it is perhaps true that the decisions of one court are not strictly binding upon the other, but each court has, throughout the history of New Jersey jurisprudence, accorded the greatest respect to the opinions of the other court. The examples cited by the respondent do not support a contrary thesis. Thus, in the case of *Flagg* v. *Johansen,* 124 N. J. L. 456, cited by the respondent, it appeared that the Court of Chancery had never rendered an adverse decision upon the matter which was before the Supreme Court. The Supreme Court was concerned with the construction of a statute and incidentally commented on the effect to be given to a statement appended to a legislative bill upon its introduction, as indicative of the legislative intent. The Supreme Court quoted with express approval prior decisions of the Chancellor in support of its conclusions, as a reference to the case will disclose. As to the excerpt quoted from the case by the respondent the Supreme Court did not say that the opinion of the Court of Chancery in the case cited was opposed to conclusions of the Supreme Court; it did no further than state that there was nothing in the opinion which tended to influence it in its conclusions. In the case of *Stabel* v. *Gertel,* 11 N. J. Misc. 247, 165 Atl. 876, quoted on page 12 of respondent's brief, the Supreme Court was confronted with conflicting

decisions of the Court of Chancery upon the same point (*McGoldrick* v. *Grebstein*, 108 N. J. Eq. 335; 154 Atl. 844; *Weyer* v. *Weyer*, 106 N. J. Eq. 112, 117; 150 Atl. 232), and it had no option but to make an independent determination of the law. It is interesting that this case was decided on March 27, 1933, and the case of *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 164 Atl. 684, also cited by the respondent as being in accord with the Supreme Court case, was decided prior to the Supreme Court case, that is, on March 4, 1933, so that any seeming conflict was resolved by the Court of Chancery's power of self-correction, and the final result was subsequently confirmed by the highest court, the Court of Errors and Appeals, as appears in respondent's brief.

If there be a conflict of opinion between coordinate state courts or in the same court, the New Jersey cases cited in the respondent's brief afford a striking example as to the operation of the corrective process of the state judicial system by which a uniform result may ultimately be achieved. However, if there is a conflict between the state and the Federal courts, there is no means by which the corrective machinery may be invoked. If there be an error in the state decision, then the same will be perpetuated in the state law if the Federal courts are free to disregard it. The litigants, instead of resorting to state courts where, in the natural course of evolution the error will be corrected, will be encouraged to resort to the Federal courts, under the diversity of citizenship jurisdiction, to avoid the effect of the state decision, thus establishing two sets of legal principles which cannot be subsequently harmonized; and who is there to say which court is erroneous? But if a state court disagrees with another state court as to the state law in the ordinary course of events, the divergence will ultimately disappear; if a Federal court arro-

gates to itself the power to say that a state court is in error, the purpose of *Erie Railroad Co.* v. *Tompkins* will have failed.

The respondent, at page 15 of her brief, in her discussion of the effect of the statutory revision of 1937, suggests that the commission on revision of the New Jersey statutory law did not have in mind the judicial construction of the statute under consideration. In this the respondent errs, for in its report the Commission on Revision and Consolidation of the Public Statutes says at page 9: "If the legislation has been construed by the courts, the construction placed upon the legislation by the courts has been carried into the revision * * *." That the effect of the revision is to be regarded as a legislative adoption of the original statute as construed by the courts, is demonstrated by the cases cited in our original brief, and we add that the case of *Helvering* v. *Hallock*, 84 L. Ed. Advance Opinions 382, cited by the respondent at page 15 of her brief, was not dealing with a positive act of Congress; it was explaining the effect of non-action. There is a vast difference between the failure of the legislative body to act and the effect of positive enactment. The *Helvering* case is not in point.

In the case of *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, 78 L. Ed. 1380, the court was not faced with the situation where an important state court, exercising statewide jurisdiction, had passed upon the points involved; the inequality which would result if a Federal Court were free to make an independent determination of the law which had already been passed on and settled by a court of statewide jurisdiction was not brought to the attention of the Court. In brief the decision antedated *Erie R. R.* v. *Tompkins*, 304 U. S. 202, 82 L. Ed. 1290, which obligated

the Federal Courts, under their diversity of citizenship jurisdiction to ascertain the state law and apply it. No authority or power is vested in them to depart from the principles of *stare decisis* or to overrule or reverse state decisions where jurisdiction rests on diversity of citizenship. *Minnesota ex rel. Pearon* v. *Probate Court, Ramsey Co.*, Vol. 84, L. Ed. Advance Opinions 477 cited by respondent at page 19 of her brief is not to the contrary.

Respondent's statement at page 21 of her brief that in *Blair* v. *Commissioner of Internal Revenue,* 300 U. S. 5, 81 L. Ed. 465, "this court found the decision of the state appellate court referred to was *res adjudicata*" is incorrect. The decision rested on the ground that a high state court had found that the interest of the beneficiary in the trust was assignable. To this proceeding in the state court the government was not a party nor claiming through any part to the suit. The doctrine of *res adjudicata* was therefore inapplicable. The only mention of the doctrine in the *Blair* case was in connection with previous tax litigation (antedating the construction of the trust and the assignment by the State Court) wherein the Circuit Court of Appeals held the assignment of the income invalid under Illinois law pertaining to spendthrift trusts. *Commissioner of Internal Revenue* v. *Blair,* 60 Fed. (2d) 340. Certiorari denied 288 U. S. 602, 77 L. Ed. 977.

The respondent suggested on page 22 of her brief that the decision of this court in the case of *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97, L. Ed. 1003, was influenced by the fact that the court was in agreement with the statutory interpretation of the New Jersey Supreme Court. If the review of the Supreme Court of the United States of the decision of the Circuit Court of Appeals in the *Hilt* case were intended to be confined to the intrinsic merits of the deci-

sion of that court, the Supreme Court probably would not have granted the application for the writ of certiorari, since no matter of great public importance was involved. The granting of the Writ must have been on the ground that the lower court decision was in conflict with the state law; this was the issue before the Supreme Court and the review was limited to this issue. The foregoing was confirmed by the opinion of this court in the case of *Erie Railroad Co.* v. *Duplak,* 284 U. S. 440 (1932), 76 L. Ed. 1214, cited in our original brief.

As to the discussion by respondent on pages 24 and 25 of her brief of the comparable functions of the New Jersey Supreme Court and the New Jersey Court of Chancery, little need be added to what was said in our original brief. It is submitted that the matter of votes to which the members of the respective courts are entitled in the New Jersey Court of Errors and Appeals seems of little or no importance, and we would point out that while the Chancellor is disqualified in participating in a review of his own decisions, the disqualification likewise extends to such of the Supreme Court Justices sitting in the final court who have passed upon the matter below; nor is it of import whether the state decisions were made by a court sitting as a reviewing tribunal or in its *nisi prius* capacity. Would it be seriously contended that, if the decision of the New Jersey Supreme Court, confirmed in the *Hilt* case, had been rendered in its capacity as a trial court, the result would have been different?

And the case of *Irving National Bank* v. *Law,* 9 Fed. (2d) 536, is not opposed to the petitioner's contention. The court made particular mention of the fact that the state decisions were in only one department and were authoritative there. The point involved had never been

passed upon in another court of the New York Appellate Division. The court properly stated that in this situation the question was to be deemed open in New York State. As comparable state courts are not required to follow the decisions of a parochial court, the Federal courts are not charged with any higher degree of obedience; it is their duty to apply the state law as the state courts would do under similar circumstances. Moreover the decision in the *Law* case antedates *Erie R. R.* v. *Tompkins, supra. Russell* v. *Todd,* 84 L. Ed. Advance Opinions 517, quoted in the respondent's brief at page 25 did not indicate accord with *Irving Nat. Bank* v. *Law, supra,* and the Court did not decline to give effect to state law shown to be applicable.

It is, accordingly, submitted that not only was the Court of Chancery entirely correct in its construction of the 1932 statute, and the Circuit Court of Appeals for the Third Circuit applied an erroneous construction of the statute, but in any case, it was the duty of the Federal court to harmonize its findings with the New Jersey law as ascertained, established and fixed by the Court of Chancery of New Jersey and confirmed by subsequent legislation re-enacting the statute as construed by the Court of Chancery.

Respectfully submitted,

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CHARLES DANZIG,
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HOOD, LAFFERTY & CAMPBELL,
Solicitors of Petitioners.

FRANCIS F. WELSH,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. [redacted] 32

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

—against—

ETHEL ADELAIDE FIELD,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

RUSSELL C. MACFALL,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 815.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, deceased,

Petitioners,

—against—

ETHEL ADELAIDE FIELD,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Preliminary Statement.

Ethel Adelaide Field, the respondent, opposes the issuance of a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Third Circuit, which reversed a judgment of the District Court of the United States for the District of New Jersey awarding the proceeds of a savings bank trust account to the petitioners.

There was no opinion delivered in the District Court. The opinion of the Circuit Court of Appeals was rendered on December 20, 1939, and was reported in 108 Fed. 2d, 521 (R., pp. 29 to 48).

Statement of the Case.

The primary question here presented is whether the Federal court, in the construction of a New Jersey statute, was required to follow two decisions of the New Jersey Court of Chancery, a trial court, both rendered after the occurrence of the facts in this case, in the absence of any decisions upon such construction by any New Jersey appellate court.

The issue presented by the case to the courts below was whether the proceeds of a savings bank account in the United States Savings Bank of Newark, New Jersey, the title of the account being "Edith M. Peck, in trust for Ethel Adelaide Field", was properly payable upon the death of Edith M. Peck to the named beneficiary, Ethel Adelaide Field, or to Miss Peck's executors. Mrs. Field, the beneficiary, claimed the proceeds of the account by virtue of the provisions of Chapters 40, 41 and 42 of the New Jersey Laws of 1932 (printed at pages 19 to 23 of the petition). The petitioners claimed the proceeds of the account as an asset of the estate of Edith M. Peck, upon the ground that the 1932 statutes did not confer upon the named beneficiary any rights to the proceeds of the account and in support of their contention, cited two decisions of the Court of Chancery, namely: *Thatcher* v. *Trenton Trust Company,* 119 N. J. Eq. 408, and *Travers* v. *Reid,* 119 N. J. Eq. 416, both of which were decided in January, 1936, a year after the decedent's death.

After trial, the District Court found for the petitioners (defendants below). Upon appeal, the United States Circuit Court of Appeals reversed the judgment of the District Court and awarded the pro-

ceeds of the account to the named beneficiary, upon the grounds that the New Jersey statutes of 1932 entitled the beneficiary to the proceeds of the bank account upon the death of the creator and that the Federal courts were not bound to follow the decisions of the Court of Chancery of New Jersey in the absence of a construction of the statutes by New Jersey's court of last resort.

The facts of the case are substantially stated at pages 2 and 3 of the petition. One important fact was omitted from that statement, namely: that the Fidelity Union Trust Company, one of the executors now claiming the bank account as an asset of the estate, acting through Frank E. Lott, its Assistant Trust Officer, assisted and advised the decedent a few days before her death in the creation of said account as a tentative trust account, upon the decedent's statement that upon her death she desired Mrs. Field to get the account (R., pp. 14 to 16).

Reasons for Denial of a Writ of Certiorari.

1. There is no conflict between the decision in this case and the decision in any other United States court case. There is no conflict between this decision and the cases of *Erie R. R. Co.* v. *Hilt,* 247 U. S. 97, and *Erie R. R. Co.* v. *Duplak,* 286 U. S. 440, cited by the petitioners, because in those cases the decision of the New Jersey Supreme Court upon a construction of a New Jersey statute was rendered by that Court while sitting as an appellate court.

2. The decision of the Circuit Court of Appeals upon the construction of the New Jersey statute was not in conflict with applicable local decisions of au-

thoritative State courts because the two 1936 decisions of the Court of Chancery, relied upon by the petitioners, have not been followed by any appellate court and in the only case citing said Court of Chancery decisions, presented to the Court of Errors and Appeals, New Jersey's court of last resort, namely: the case of *Cutts* v. *Najdrowski,* 123 N. J. Eq. 481; 198 Atl. 885, which reversed the Court of Chancery (the Vice-Chancellor's opinion is reported in 121 N. J. Eq. 546, 191 Atl. 867), the highest court ignored the *Thatcher* and *Travers* citations and summarily dismissed the contention for which they were cited as authority.

3. An exhaustive search has disclosed no reported case where this Court has granted certiorari to review a Federal court decision construing a local statute contrary to the construction thereof by a State trial court, in the absence of a construction by an authoritative State appellate court.

Argument.

Summary of the Argument.

POINT I—The 1932 statutes of New Jersey effectively validated tentative trusts with respect to savings bank accounts.

POINT II—The Federal courts are not bound to follow decisions of the New Jersey Court of Chancery, sitting as a trial court, construing the State statute, particularly where the decisions nullify the plain mandate of the statute.

POINT III—The petition for a writ of certiorari should be denied.

POINT I.

The 1932 statutes of New Jersey effectively validated tentative trusts with respect to savings bank accounts.

The respondent has conceded that prior to the enactment of the 1932 statutes, tentative trusts of savings bank accounts were invalid in New Jersey. Such savings bank trust accounts were made valid, however, by Chapters 40, 41 and 42 of the New Jersey Session Laws of 1932. These laws plainly provide, in effect, that when any deposit is made by any person in trust for another, without other or further notice of the existence and terms of a legal and valid trust being given to the bank, then upon the death of the trustee the account shall be paid to the beneficiary, and the legal representatives of the deceased trustee shall have no right to the proceeds of the account (Petition, p. 19).

That this statute was concluded to mean exactly what it says, at the time of the deceased's death in January, 1935, is indicated by the fact that the deceased was advised, prior to her death, by an Assistant Trust Officer of the petitioner, Fidelity Union Trust Company, to create this account in trust for Mrs. Field in order to effectuate Miss Peck's intent that, in the event of her death, Mrs. Field should obtain the proceeds.

The provision of the statute that the "legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds

so deposited may have been the property of the trustee" would seem to effectively bar any claim of the petitioners to the bank account.

POINT II.

The Federal courts are not bound to follow decisions of the New Jersey Court of Chancery, sitting as a trial court, construing the State statute, particularly where the decisions nullify the plain mandate of the statute.

Petitioners have made claim to the bank account upon the authority of the cases of *Thatcher* v. *Trenton Trust Company, supra,* and *Travers* v. *Reid, supra,* which were decided by the Court of Chancery of New Jersey at approximately the same time in January, 1936, upon facts substantially similar to the facts in this case. In each of these two cases, the decision was rendered by a Vice-Chancellor, sitting as a trial judge, in an equity suit. Neither of the cases were reviewed by appeal and no appellate court of New Jersey has passed upon the validity of the 1932 Acts.

Petitioners have cited *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, in support of their argument that the Federal courts were required to follow these Court of Chancery decisions. *Erie* v. *Tompkins* has no application to the point involved because the Federal courts were bound, prior to that decision, to follow the decisions of the State courts of last resort in the construction of local statutes. Such has been the rule at least since *Elmendorf* v. *Taylor,* 10 Wheat. 152, and was reiterated by this Court as recently as

February 26, 1940, in *Minnesota Ex Rel. Pearson* v. *Probate Court, Ramsey Co.* (No. 394, this Term), Vol. 84, Supreme Court, Law Ed. Advance Opinions, page 477, where this Court said (at p. 479):

> "* * * For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest Court of the State has interpreted it. * * *."

The decisions of inferior State tribunals have never been regarded as of binding force upon the Federal courts. This is particularly so where the decision of a trial court nullifies or renders ineffective the plain intent of the statute.

The petitioners also rely upon the case of *Erie R. R. Co.* v. *Hilt,* 247 U. S. 97, in their contention that the Federal courts were required to follow the decisions of the Court of Chancery, but in that case this Court simply held that the Circuit Court of Appeals should have followed a decision of the Supreme Court of New Jersey which gave a full literal meaning to the statute there involved and which was rendered by the New Jersey Supreme Court as an appellate court in the review of a judgment of the New Jersey Circuit Court. In that case, this Court indicated its agreement with the interpretation of the statute made by the New Jersey Supreme Court. The *Hilt* decision contains no suggestion that the same ruling would have been made had the local decision, construing the State statute, been rendered by a trial court with the effect of voiding the statute.

The argument of the petitioners that the New Jersey Court of Chancery is of equal importance with

the Supreme Court of New Jersey is beside the point. It may be noted, however, from the authorities cited in the petitioners' brief, that the New Jersey Supreme Court is a court of important appellate, as well as original, jurisdiction, whereas the Court of Chancery is without appellate jurisdiction. It may also be noted therefrom that in the composition of the Court of Errors and Appeals, the Supreme Court has nine votes, whereas the Court of Chancery has but one. In considering their relative importance, a more proper comparison may be made of the functions of the respective courts in the cases under consideration, as well as the effect of the respective decisions. The decisions of a trial court which refuse to give effect to a duly adopted legislative act, cannot be truthfully compared as of equal weight with the decision of an appellate court giving literal effect to the expressions of a legislative act.

The recognition of the principle contended for by the petitioners that decisions of the Court of Chancery of New Jersey, sitting as a trial court, voiding a legislative act, are binding upon other courts of equal or superior jurisdiction, would be an extension of the rule of *stare decisis* too radical to calmly contemplate. Petitioners have not contended, nor can they validly contend, that the decisions of the Court of Chancery would be binding upon the Court of Errors and Appeals or, indeed, upon the Supreme Court of New Jersey, when the question of the construction of the 1932 statutes is presented to those courts. By what authority then are the Federal Courts so bound?

Until the question of the construction of these statutes is finally determined by the highest court of New Jersey, or, at least, by an authoritative ap-

pellate court, the Federal courts, although giving due consideration to lower court decisions, are free to determine whether or not those decisions truly express the local law.

POINT III.

The petition for a writ of certiorari should be denied.

Respectfully submitted,

RUSSELL C. MACFALL,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, Deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

RUSSELL C. MACFALL,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, Deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

RESPONDENT'S BRIEF.

Opinions of the Courts Below.

The Findings of Fact and Conclusions of Law and Judgment of the District Court were rendered December 29, 1938, and will be found in the Transcript of Record, at pages 23, 24 and 25. There was no accompanying opinion. The opinion of the Circuit Court of Appeals for the Third Circuit was rendered December 20, 1939, and was reported under the title of *"Field* v. *Fidelity Union Trust Company, et al.,"* in 108 Fed. 2d, 521, and is set forth in full in the record (R., pp. 29 to 48).

Statement of Jurisdiction.

1. The date of the judgment of the Circuit Court of Appeals for the Third Circuit to be reviewed was December 20, 1939. The petition for a writ of certiorari was filed March 16, 1940 and granted on April 22, 1940.

2. The jurisdiction of the court to issue the writ of certiorari herein granted was invoked under Judicial Code, Section 240(a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Section 347).

Statement of the Case.

The issue presented by the case to the courts below was whether the proceeds of a savings bank account in the United States Savings Bank of Newark, New Jersey, the title of the account being "Edith M. Peck, in trust for Ethel Adelaide Field", was properly payable, upon the death of Edith M. Peck, to the named beneficiary, Ethel Adelaide Field, or to Miss Peck's executors. Mrs. Field, the beneficiary, claimed the proceeds of the account by virtue of the provisions of Chapters 40, 41, 42 and 43 of the New Jersey Laws of 1932 (printed in full at pp. 28 to 34 of the Petitioners' Brief), the relevant provisions thereof being as follows:

> Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit

was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; provided, that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee.

The petitioners claimed the proceeds of the account as an asset of the estate of Edith M. Peck, upon the ground that the 1932 statute did not confer upon the named beneficiary any rights to the proceeds of the account and in support of their contention, cited two decisions of the New Jersey Court of Chancery, namely: *Thatcher* v. *Trenton Trust Company,* 119 N. J. Eq. 408, and *Travers* v. *Reid,* 119 N. J. Eq. 416, both of which were decided in January, 1936, a year after the decedent's death.

After trial, the District Court found for the petitioners (defendants below). Upon appeal, the United States Circuit Court of Appeals reversed the judgment of the District Court and awarded the proceeds of the account to the named beneficiary, upon the grounds that the New Jersey statute of 1932 entitled the beneficiary to the proceeds of the bank account upon the death of the creator and that the Federal courts were not bound to follow the contrary decisions of the Court of Chancery in the absence of a construction of the statutes by New Jersey's court of last resort.

The facts of the case are substantially stated at pages 2 and 3 of the Petitioners' Brief. One important fact was omitted from that statement, namely: that the Fidelity Union Trust Company, one of the executors now claiming the bank account as an asset of the estate, acting through Frank E. Lott, its Assistant Trust Officer, assisted

and advised the decedent a few days before her death in the creation of said account as a tentative trust account, upon the decedent's statement that upon her death she desired Mrs. Field to get the account (R., pp. 14 to 16).

The Issue.

The question presented is whether the Federal court, in determining the applicable local law, was bound by the two decisions of the New Jersey Court of Chancery, construing the New Jersey statute, in the absence of any decisions thereon by any New Jersey appellate court.

It is proper to state, at this point, that the respondent takes no serious issue with the authorities cited by the petitioners other than the *Thatcher* and *Travers* decisions. It will appear from the argument following that many of the cases relied upon by the petitioners amply support the respondent's case. Furthermore, it is submitted that it is unnecessary, in the determination of the present issue, to consider objectively the relative importance of the Court of Chancery and the Supreme Court of New Jersey in that state's judicial system, as the petitioners' third point attempts to do. But this departure from the essential issue will be hereinafter discussed.

ARGUMENT.

Summary of the Argument.

POINT I. The New Jersey statute of 1932 validated tentative trusts with respect to savings bank deposits, and entitled the respondent to the deposit upon the death of the trustee.

POINT II. In awarding the account to the respondent the Circuit Court of Appeals properly concluded that the decisions of the Court of Chancery did not truly express the local law.

POINT III. Until the effect of the 1932 statute is finally determined by New Jersey's court of last resort or at least by an authoritative Appellate Court of that State, the Federal courts are free to determine whether or not the decisions of the Court of Chancery truly express the local law.

POINT IV. The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

POINT I.

The New Jersey Statute of 1932 validated tentative trusts with respect to savings bank deposits, and entitled the respondent to the deposit upon the death of the trustee.

Savings-bank accounts of the kind here involved have been commonly referred to as tentative trusts. Such tentative trusts or savings bank trust accounts have been found socially desirable by many states, probably because they constitute a method whereby persons of small means may provide for disposition of their savings at death without the expense and trouble of administration. While obviously such accounts do not fulfil the strict requirements of a true trust or a valid gift, their validity has been recognized by the weight of authority. This general acceptance of the validity of such trusts is recognized in *Restatement of the Law of Trusts*, as follows:

"Sec. 58. TENTATIVE TRUST OF SAVINGS DEPOSIT. Where a person makes a deposit in a savings account

> in a bank in his own name as trustee for another person intending to reserve a power to withdraw the whole or any part of the deposit at any time during his lifetime and to use as his own whatever he may withdraw, or otherwise to revoke the trust, the intended trust is enforceable by the beneficiary upon the death of the depositor as to any part remaining on deposit on his death if he has not revoked the trust."

It is conceded that prior to the enactment of the 1932 laws, the courts of New Jersey uniformly refused to recognize the validity of such savings bank trust accounts. In an attempt to modify the law as determined by the courts, the New Jersey Legislature, in 1903, passed an act, *New Jersey Compiled Statutes 1910, page 5666, Sec. 32,* which provided:

> "Whenever any deposit shall be made by any person in trust for another and no other or further notice of the existence and terms of a legal and valid trust shall have been given to the trust company, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, may be paid to the person for whom the said deposit was made, or to his or her legal representatives."

However, in 1930, the New Jersey courts held that the 1903 act was simply permissive and that it was not effective to change the earlier rule of law because it provided only that the deposit *may* be paid to the person for whom it was made, and that the purpose of the act was merely to protect the banks.

Shortly following such decisions, which awarded the proceeds of such accounts to the estates of the trustees, the New Jersey Legislature, obviously with the intent of changing the legal rule and with the intent of modifying the requirements of a valid trust as to bank accounts created

in trust for a named beneficiary, adopted the 1932 statute which provided that such an account, upon the death of the trustee, *shall* be paid to the person for whom the deposit was made and provided further *that the legal representative of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon, notwithstanding that the funds so deposited may have been the property of the trustee.*

As there is no restriction upon the power of the legislature to modify by statute the theretofore existing law as to the necessary elements of a gift, or of a declaration of trust, or to provide and validate an additional method of creating a voluntary revocable trust, it follows that the courts exercising jurisdiction in New Jersey must give effect to the statute in those cases where it is applicable, unless the statute is so ambiguous as to fail to disclose the legislative intent or unless its provisions are clearly repugnant to the constitution of the State.

That this statute was accepted to mean exactly what it said at the time that the bank account in question was created by Miss Peck, in January, 1935, is indicated by the fact that the deceased was advised, prior to her death, by an Assistant Trust Officer of the petitioner, Fidelity Union Trust Company, to create this account in trust for Mrs. Field in such form, in order to effectuate Miss Peck's declared intent that in the event of her death Mrs. Field should obtain the proceeds, and that such form of account was approved for said purpose also by the auditor of the United States Savings Bank and so opened by said bank (R., pp. 14-16, 19, 20).

The majority opinions of the Circuit Court of Appeals indicate clearly that no fault could be found with this statute either as to the clarity of its intent or as to its constitutionality, nor does the dissenting opinion of that Court make any attempt to point out any such defect.

The provisions of the statute would seem to effectively entitle the respondent to the proceeds of the bank account and to effectively bar any claim of the "legal representatives of the deceased trustee", the petitioners, to the account. However, the petitioners made a claim thereto upon the authority of the cases of *Thatcher* v. *Trenton Trust Co., supra,* and *Travers* v. *Reid, supra,* which were decided by the Court of Chancery of New Jersey at approximately the same time in January, 1936, upon facts substantially similar to the facts in this case. In each of these two cases, the decision was rendered by a Vice-Chancellor, sitting as a trial judge, in an equity suit. Neither of the cases was reviewed by appeal and no appellate court of New Jersey has passed upon the validity of the 1932 acts. It is, therefore, necessary to determine whether these two decisions of the Court of Chancery were effective to nullify the legislative enactment and to settle the applicable local law.

POINT II.

In awarding the account to the respondent the Circuit Court of Appeals properly concluded that the decisions of the Court of Chancery did not truly express the local law.

Circuit Judge Biddle, in his opinion below, discussed fully the reasons advanced by the Vice-Chancellors in the *Thatcher* and *Travers* cases for their refusal to enforce the 1932 Act and pointed out the errors of those decisions (R., pp. 38 to 40). The Court of Chancery recognized that the purpose of the statute was to effectuate a change in the earlier law so that such tentative trust accounts would be valid in New Jersey, but held that the language thereof was confused, impractical and wholly unsatisfactory and that the Act by its terms did not dispense with the necessity

of the existence of all of the elements of a legal and valid trust, as required prior to the adoption of the statute. It is unfortunate that the language of the Act did not meet the standards of draftsmanship demanded by the Court of Chancery, but this cannot be deemed a proper objection to its validity and the test is not whether the Act could have been better drawn but, on the contrary, the question is whether the legislative intent is sufficiently clear therefrom. *Ott* v. *Braddock*, 119 N. J. L. 507; 197 Atl. 271 (Court of Errors and Appeals, decided January 26, 1938).

The Court of Errors and Appeals has said in *State* v. *Dolbow*, 117 N. J. L. 560, at page 565:

> "Every presumption is in favor of the constitutionality of legislation, and an act must be sustained unless clearly repugnant to the constitution of the state. *Attorney-General* v. *McGuinness*, 78 N. J. L. 346."

and, further, at page 566, the Court said:

> "It is the substance and spirit of the constitution that must remain inviolate, and if this has been preserved we should not avail ourselves of the matter of mere form to declare the Act void."

Another fundamental rule of statutory construction which was disregarded in the *Thatcher* and *Travers* decisions was clearly recognized in *Brown's Estate* v. *Town of Union*, 62 N. J. L. 142; 40 Atl. 632, affirmed in 65 N. J. L. 601; 48 Atl. 562, as follows (headnote):

> "When an act is susceptible of two constructions that which will validate it must be adopted, and not that which will render it unconstitutional."

Yet the Court of Chancery in said decisions assumed the statute to be unconstitutional and even advanced reasons as to its unconstitutionality which did not exist in the state of facts before that Court.

The petitioners have advanced as an argument that the Circuit Court of Appeals erred in refusing to apply the New Jersey statute as construed by the Court of Chancery but, as construed by the Court of Chancery, the statute cannot be applied. In fact, such construction determines that it may not be applied in any case in which its application would be helpful because, according to that Court, it is only applicable when all the elements of a legal and valid trust already exist. It is too obvious for argument to note that if all of the elements of a legal trust are present, the beneficiary would become entitled to the deposit by virtue of the trust without need of the aid of the statute. To attribute to the statute this limited effect is to render it meaningless and without any effect whatever, with the result that the legislative act and intent have been nullified, not construed.

Such a result has been expressly disapproved by New Jersey's court of last resort as violative of the fundamental law. In *Ott* v. *Braddock, supra,* that Court in considering the constitutionality of an act covering municipal employees said:

> "Section 4 of the 1934 act was patently intended to extend the preferential features of the act to those who had been removed from or demoted in such departments before its adoption, *otherwise it is totally unnecessary and superfluous in the statute,* as the first three sections thereof govern dismissals for reasons of economy taking place after its adoption and it would be pointless to add the fourth section to cover the same ground. * * * Where, as here, an act is plain and unambiguous in its terms, the rule is fundamental that there is no room for judicial construction, since the language is presumed to evince the legislative intent." (Italics supplied.)

The conclusion is inescapable that the Court of Chancery in the *Thatcher* and *Travers* decisions, and the trial court below, in refusing to apply the statute, disregarded fundamental rules of construction. No consideration was given to the presumption of the constitutionality of the act, nor to the presumption that the Legislature did not intend to adopt a superfluous law, nor to the rule that where an act is unambiguous in its terms there is no room for judicial construction because the language is presumed to evince the legislative intent, nor to the rule that where an act is susceptible of two constructions, that which will validate it must be adopted.

If such decisions carry the weight and authority for which the petitioners have argued, it would be necessary to recognize that a situation exists whereby the will of the people of the State of New Jersey, as expressed through its legislature, may be set aside solely by the decision of a trial judge.

Fortunately, this is not the fact. The effect and validity of the 1932 statute will ultimately be determined when the Court of Errors and Appeals of New Jersey passes upon this question. The decisions of the Court of Chancery do not settle the law of the state. The Court of Errors and Appeals in *Dorman* v. *West Jersey Title and Guaranty Co.*, 92 N. J. L. 487, said, at page 489, referring to decisions of the Court of Chancery:

> "It is sufficient to say that both of these cases were decided in the Court of Chancery, which is not binding upon this court."

Nor are the decisions of the Court of Chancery binding upon the Supreme Court of New Jersey. In *Flagg* v. *Johansen*, 124 N. J. L. 456, the Court, in an appeal from a judgment of the Fourth District Court of Union, indi-

cated its independence of the conclusions of the Court of Chancery, at page 461. It said:

> "We have examined the learned opinion of the Court of Chancery in *State Board of Milk Control* v. *Richman Co.*, 117 N. J. Eq. 296, but are not influenced thereby contrary to our view of the law herein expressed."

The conclusions of the Supreme Court upon the point under discussion were in direct disagreement with the quoted Chancery case.

That decisions of the Court of Chancery do not settle the law of the state and are not binding upon the Supreme Court of New Jersey, even while sitting as a trial court, and are not binding even upon the Court of Chancery, has been further demonstrated in the case of *McGoldrick* v. *Grebenstein*, 108 N. J. Eq. 335, 154 Atl. 844, wherein Vice-Chancellor Fielder held that an act modifying the law of descent (Laws of 1926, Chapter 41, p. 77) did not have retroactive effect as to lands acquired prior to its enactment. Subsequently, the Supreme Court of the State, at a trial term, in the case of *Stabel* v. *Gertel*, 11 N. J. Misc. 247, 165 Atl. 876, refused to follow the Chancery decision saying:

> "It is true that the case of *McGoldrick* v. *Grebenstein* seems to give countenance to the plaintiffs' contention that P. L. 1926, page 77, does not apply to land acquired by a wife prior to its passage, but the distinction between legislation pertaining to curtesy and that pertaining to descent, as hereinabove noticed, seems not to have been considered by the court, and the rule applicable to dower and curtesy was applied indiscriminately to all legislation pertaining to a husband's interest in his wife's real estate."

The Supreme Court ruling was affirmed by the Court of Errors and Appeals by a *per curiam* opinion in 111 N. J. L.

296, 168 Atl. 645. Furthermore, Vice-Chancellor Church, speaking for the Court of Chancery, in *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 164 Atl. 684, also refused to follow the earlier decision of the same court in *McGoldrick* v. *Grebenstein*, referring to said decision as follows:

> "In the first place, the *McGoldrick* case gives neither reason nor authority for its statement in this behalf; and the conclusion is obviously based upon a premise which proves to be untrue in fact, as has been already pointed out."

It is interesting to note from that reported decision that because it was in disagreement with the earlier decision of the same court, it was first submitted by the Vice-Chancellor to the Chancellor for his approval, in accordance with the principles established for the conduct of the business of the Court of Chancery by the Chancellor, as enunciated in *Gregory* v. *Gregory*, 67 N. J. Eq. 7, 58 Atl. 287, which case has been cited by the petitioners in support of their third point. It is also pertinent to note here that in *Gregory* v. *Gregory*, *supra*, the Chancellor fully recognized that the decisions of the Court of Chancery do not settle the law of the state, for the Chancellor said:

> "In all ordinary cases it is essential to the conduct of the business of the Court that the Chancellor should decline to revise the opinion of a Vice-Chancellor or to refuse to follow his advice, and this, in my judgment, was the plain intent of the legislation. *Parties may well in such cases be left to obtain relief by review of the decree by appeal.*
>
> "Yet I deem it equally obvious that there are, or may be, exceptional cases, in which it would be the duty of the Chancellor to review the conclusions reached by a Vice-Chancellor, and to consider whether or not his advice should be followed. I can conceive of only two classes of such cases. One class, I think,

> would be composed of cases in which the decree advised is based upon a principle, or the conclusion reached is by a course of practice, in direct opposition to previous decisions of the Chancellor, or of some Vice-Chancellor whose advice has been acted upon by the Chancellor. The obvious reason is that the Court of Chancery must speak with one voice, and not discordantly. * * *" (Italics supplied.)

Thus, the usual uniformity of the decisions of the Court of Chancery is explained, but it is equally obvious that the opinion of one Vice-Chancellor is not considered as *stare decisis* upon the other Vice-Chancellors, as the petitioners have sought to argue so as to compel the Court of Chancery to follow its own earlier decisions if found erroneous upon reconsideration.

It is significant that although the petitioners' arguments have attempted to attribute to the decisions of the Court of Chancery the qualities of the doctrine of *stare decisis,* they have advanced no supporting authorities. They have been required to rely upon the case of *Ramsey* v. *Hutchinson,* 117 N. J. L. 222, wherein the Court of Errors and Appeals followed a construction of a local statute made by the Court of Chancery, saying that:

> "Irrespective of the inherent merit of this construction a ruling uniformly made by the Supreme Court (or the Court of Chancery) over a course of years should not be set aside by us except for cogent and important reasons."

However, it need only be said that the *Ramsey* case, decided in 1936, referred to a ruling made thirty-six years earlier in the case of *Biddle* v. *Pugh,* 59 N. J. Eq. 480, which in turn was based upon earlier decisions. And even here, the Court of Errors and Appeals indicated that it would set aside such a ruling for cogent and important

reasons. It is doubtful if there could exist a more cogent and important reason for disregarding a decision than that the decision is clearly erroneous.

The petitioners have argued that the *Thatcher* and *Travers* decisions have become the established law of New Jersey because the 1932 statute was reenacted subsequent to said decisions, in 1937, by the New Jersey Legislature and that by such reenactment the Legislature has adopted that interpretation of the statute placed upon it by the Court of Chancery. In disposing of this argument it need only be said that the 1937 reenactment of the statute was nothing more than the adoption by the Legislature of the revision of the entire statute law of the State, which revision was first authorized by P. L. 1925, Chapter 73, approved March 12, 1925, and was in course of preparation by a commission appointed for said purpose from said date to December 20, 1937, when the commission on revision and consolidation presented its final report to the Legislature. On the same day, the Revised Statutes of New Jersey 1937 was adopted and became effective. P. L. 1937, Chapter 188, December 20, 1937. To seriously contend that the 1937 reenactment of the 1932 act constituted legislative approval of the Court of Chancery's interpretation of that act is to distort a rule of construction to a ridiculous degree, for it can hardly be assumed that the New Jersey Legislature in completing the revision of the New Jersey statute law known as the Revision of 1937, a task of twelve years' duration, had anything in mind other than the completion of that task. Indeed, this Court in *Helvering* v. *Hallock*, 84 L. Ed. Advance Opinions 382, decided January 29, 1940, pointed out the pitfalls of such a rule of construction, saying, at page 389:

> "* * * To explain the cause of nonaction by Congress when Congress itself sheds no light is to venture

> into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; and there is no indication that as to the *St. Louis Union Trust Co.* cases it had, even by any bill that found its way into a committee pigeonhole. * * * Various considerations of parliamentary tactics and strategy might be suggested as reasons for the inaction of the Treasury and of Congress, but they would only be sufficient to indicate that we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

The *Helvering* case, too, disposed effectively of the petitioners' argument that the decisions of the Court of Chancery of New Jersey have received sanctity because they have not been challenged for a period of four years by any other state court. The present suit was instituted in May, 1937. Surely the petitioners are entitled to no advantage by reason of the lapse of time necessary to the litigation. The *Thatcher* and *Travers* decisions were made in January, 1936, a year after the bank account in question was created and the respondent's rights had accrued. As in the *Hallock* case, the present suit does not present a situation where the rights and interests of the parties were created in reliance upon the *Thatcher* and *Travers* decisions.

The recognition of the principle contended for by the petitioners that decisions of the New Jersey Court of Chancery, sitting as a trial court, voiding a legislative act, are binding upon other courts of equal jurisdiction, would constitute a distortion of the rule of *stare decisis*. As this Court said in the *Hallock* case, *supra*, at page 388:

> "We recognize that *stare decisis* embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic

need to satisfy reasonable expectations. But *stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

The above comment was addressed to a set of facts much more nearly within the rule of *stare decisis* than in the present case, but it is equally pertinent. To attribute to the Court of Chancery decisions the qualities of the rule of *stare decisis* requires a disavowal of those fundamental rules of construction above pointed out which have met the test of time and have received universal approval of the courts.

It appears conclusive that the decisions of the New Jersey Court of Chancery do not settle the law of the State of New Jersey. They are not binding upon the other state courts of New Jersey. As they do not settle the state law and are not controlling upon other state courts, then by what authority are the Federal courts so bound?

POINT III.

Until the effect of the 1932 statute is finally determined by New Jersey's Court of last resort or at least by an authoritative appellate court of that state, the Federal courts are free to determine whether or not the decisions of the Court of Chancery truly express the local law.

The respondent recognizes that where, as in this case, the jurisdiction of the Federal courts rests solely upon diversity of citizenship, and the issues involve the construction and application of a local statute, the parties and the Federal

courts must "search for and apply the entire body of substantive law governing an identical action in the state courts", as was said by this Court in *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, at page 209, 82 L. Ed. 1290. No advantage exists to the litigants because the federal jurisdiction has been invoked, nor should any disadvantage result, and if in an identical action in the state courts those courts are free to disagree with the decisions of the Court of Chancery, the Federal courts likewise are free, and are charged with the duty of determining and applying the applicable local law.

In *Burns Mortgage Company* v. *Fried*, 292 U. S. 487, 78 L. Ed. 1380, a case involving the applicability of the Negotiable Instruments Law of Florida, this Court said, at page 496:

> "The absence of a decision by the Supreme Court of the State did not relieve the courts below from applying the Florida statute. Lacking such authoritative construction, their duty was to determine the question according to the accepted canons and in the light of the decisions of the courts of other states with respect to the same sections of the Negotiable Instruments Law.
>
> "If, as is admitted, the court of last resort of the state, holds that provision for payment of interest in instalments prior to maturity of principal does not render the sum payable so uncertain as to destroy negotiability, we think an added stipulation that overdue interest shall bear interest at a named rate until paid would not call for a different decision. Courts which have had occasion to consider the effect of the Act upon instruments of like tenor, have uniformly pronounced them negotiable. And cases decided prior to the adoption of the Act are to the same effect. No contrary decision has been brought to our notice. *Until the*

> *Supreme Court of Florida holds otherwise, we are justified in construing the Act in accordance with what we think its intent,* especially as this construction accords with the views of the courts of other states." (Italics supplied.)

The authorities relied upon by the petitioners to sustain their contention that the Federal courts are bound by the *nisi prius* Chancery decisions, do not support that view, nor has this Court ever recognized such a principle. To do so would constitute an abdication of the jurisdiction of the Federal courts, which has been always recognized as co-ordinate with, but not subordinate to, that of the state courts exercising comparable jurisdiction. Consequently, it cannot be concluded that in determining the applicable local law, the Federal courts are bound to follow lower state courts decisions which are not binding upon the state's appellate courts and which, therefore, do not settle the local law.

The cases of *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, and *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202, 82 L. Ed. 1290, do not support the argument of the petitioners and have no particular application to the issue presented. Those decisions left untouched the well established rule that the Federal courts are bound by the decisions of the highest court of the state in matters depending upon the construction of state statutes or constitution and which was reiterated by this Court as recently as February 26, 1940 in *Minnesota ex rel. Pearson* v. *Probate Court, Ramsey Co.,* Vol. 84, L. Ed. Advance Opinions 477, where this Court said, at page 479:

> "* * * For the purpose of deciding the constitutional questions appellant raises we must take the statute as though it read precisely as the highest court of the State has interpreted it."

Nor does the dissenting opinion of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co.,* 215 U. S. 349, 54 L. Ed. 228,

which has been cited by the petitioners, lend any further aid to their argument, because in that opinion Mr. Justice Holmes recognized that it was the decisions of state courts of last resort that settled the law for the state. And this Court, in *Erie Railroad Co.* v. *Tompkins, supra,* at page 79, quoting from the dissenting opinions of Mr. Justice Holmes in *Kuhn* v. *Fairmont Coal Co., supra,* and in *Black & W. Taxicab Co.* v. *Brown & Y. Taxicab Co.,* 276 U. S. 518, 532-536, 72 L. Ed. 681, 686-688, established that "the authority and only authority is the state, and if that be so, the voice adopted by the state as its own (whether it be of its Legislature or of its Supreme Court) should utter the last word." Indeed, the reference to the opinion of Mr. Justice Miller in *Brine* v. *Hartford Fire Insurance Co.,* 96 U. S. 627, quoted by the petitioners from the dissenting opinion of *Kuhn* v. *Fairmont, supra,* serves to answer the argument advanced by Circuit Court Judge Jones in his dissenting opinion below, to the effect that the Court of Chancery decisions should have been followed to provide the desirable uniformity of decisions of the Federal courts with the State courts. The statement from *Brine* v. *Hartford Fire Insurance Co., supra,* as quoted by the petitioners, is:

> "To administer a different law is to introduce into the jurisprudence of the State of Illinois the discordant elements of a substantial right which is protected in one set of courts and denied in the other *with no superior to decide which is right.*" (Italics supplied.)

Such a situation has never existed with respect to the statute law of a state and since the decision of *Erie Railroad Co.* v. *Tompkins, supra,* no longer otherwise exists. This is because the state court of last resort is admittedly the final arbiter to decide and settle the law where there

are conflicting decisions between the lower state and the Federal courts as to the local law. Furthermore, the argument advanced by the dissenting opinion below for the desirability of uniformity of decisions as the justification for following the palpably erroneous *Thatcher* and *Travers* decisions, overlooks the duty of the Federal courts to apply the applicable local law and to determine such law where the state decisions lack authority and the state court of last resort has not yet finally determined it. That the discharge of such duty results in a temporary conflict of decisions, is no logical justification for evading it, because there is a final authority to decide which is right. If the logic of this argument is pursued to its end, the New Jersey Supreme Court would be bound by decisions of the Court of Chancery and such is not the case. An equally important error in such reasoning for the desirability of temporary uniformity of opinion is that it overlooks the requirement of section 34 of the Federal Judiciary Act of September 24, 1789 (28 U. S. C. A. 725), which requires that the 1932 statute shall be regarded as a rule of decision in trials in the Federal courts, and as the statute is plainly contradictory of the Chancery decisions, only the Court of Errors and Appeals of New Jersey is the superior authority to finally settle the local law.

In the case of *Blair* v. *Commissioner of Internal Revenue*, 300 U. S. 5, 81 L. Ed. 465, cited by the petitioners as authority for the proposition that a decision of an intermediate appellate court is binding upon the Federal courts, it need only be said that in that case this Court found the decision of the state appellate court referred to was *res adjudicata*, this Court saying, at page 10:

> "In this instance, it is not necessary to go beyond the obvious point that the decision was in a suit be-

> tween the trustees and the beneficiary and his assignees, and the decree which was entered in pursuance of the decision determined as between these parties the validity of the particular assignments."

The case of *New York Life Insurance Co.* v. *Ruhlin,* 25 Fed. Supp. 65, also cited by the petitioners, apparently relied upon *Blair* v. *Commissioner, supra,* notwithstanding that the decision of the intermediate Appellate Court, therein referred to, was *res adjudicata.*

Circuit Court Judge Biddle, in his opinion below, fully considered the case of *Erie Railroad Co.* v. *Hilt,* 247 U. S. 97, 62 L. Ed. 1003, which case is strongly relied upon by the petitioners, and duly pointed out that that decision did not hold that the Federal courts were bound by the decision of a trial judge in the construction of a state statute. In that case, this Court was in agreement with the construction placed upon the New Jersey statute by the New Jersey Supreme Court, the Court saying, at page 100:

> "The words of the statute seem to us to require a different construction from that adopted, and they have been given their full literal meaning by the Supreme Court of the state in the case of an infant younger than the plaintiff. *Barcolini* v. *Atlantic City and S. R. Co.,* 82 N. J. L. 107, 81 Atl. 494",

meaning that, in the opinion of this Court, the construction adopted by the lower Federal court was erroneous and the construction adopted by the Supreme Court of New Jersey was reasonable. But Mr. Justice Holmes, speaking for the court, continued:

> "In view of the importance of that tribunal in New Jersey, although not the highest court in the state,

> we see no reason why it should not be followed by the courts of the United States even if we thought its decision more doubtful than we do."

It is suggested respectfully that the late Mr. Justice Holmes probably would have been among the first to acknowledge that that portion of the opinion last quoted was not necessary to the decision of the case. In any event, it can hardly be relied upon as authority in the case under review, where the effect of the Chancery decisions is to void the legislative act rather than to construe it, and where there can be no substantial doubt as to the unsoundness of such decisions. Furthermore, the decision of the New Jersey Supreme Court, referred to and followed in the *Hilt* case, was rendered by the state Supreme Court in 1911, seven years earlier, while that court was sitting as an appellate court in the review of a judgment of the New Jersey Circuit Court.

As for the decision of this Court in *Erie Railroad Co.* v. *Duplak*, 286 U. S. 440 (1932), 76 L. Ed. 1214, also cited by the petitioners, it should be noted that the facts therein were substantially the same as in the *Hilt* case, involving the same local statute, and that this Court simply followed its decision in the *Hilt* case. Because of the *Hilt* and *Duplak* decisions, the petitioners have sought to argue that the Court of Chancery of New Jersey is of equal rank and importance with the Supreme Court in the judicial system of that State, so that it may be concluded that the *Hilt* ruling should apply with equal force to decisions of the Court of Chancery. The respondent does not care to take issue with the proposition of the relative general importance of these courts in the New Jersey judicial system, because it is believed that it will better serve the determination of the issues here involved

to compare the functions of the respective courts in the cases under consideration, as well as the effect of the respective decisions. The decisions of a trial court which refuse to give effect to a duly adopted legislative act, such as the *Thatcher* and *Travers* decisions, cannot be truthfully compared as of equal weight and effect with the decision of the Supreme Court, sitting as an appellate court and giving literal effect to the expressions of a legislative act. The fact that the judges of both the Court of Chancery and the Supreme Court receive the same salaries, that the Court of Chancery is first mentioned before the Supreme Court in the state constitution, that both courts have statewide original jurisdiction in their respective spheres, and that the Chancellor is the President of the Court of Errors and Appeals, can offer little aid to the issue under review. Along the same lines, it can also be noted that in the composition of the Court of Errors and Appeals the Supreme Court has nine votes out of a total of sixteen and the Court of Chancery but one (New Jersey Constitution, Article VI, Section 2, Revised Statutes 1937, 2:4-1), and that while sitting in review of a decree of the Court of Chancery, by long established custom, even this one vote is lost because the Chancellor may not participate in a review of his own decisions. Moreover, the New Jersey Supreme Court is a court of important appellate, as well as original, jurisdiction, whereas the Court of Chancery is without appellate jurisdiction in any case (New Jersey Constitution, Article VI, Section 5), and the Supreme Court is a court of last resort in appeals from a judgment of a Circuit Court in a contested election case and in appeals from the Court of Common Pleas (Revised Statutes of New Jersey, 2:27-350; *DeFeo* v. *People's Gas Co.*, 104 N. J. L. 156, 138 Atl. 875).

It is unnecessary to comment upon the remaining cases referred to by the petitioners in which the Federal courts

have followed the decisions of intermediate appellate courts of the state in the construction of local statutes. Those cases have been fully commented upon in the majority opinion of the Circuit Court of Appeals. It is significant, however, that the petitioners have not cited a single authority in support of their argument that the Federal courts, in the absence of any decision by the court of last resort of a state upon a local statute, are bound by a construction placed thereon by a trial court.

It is submitted that the applicable rule has been correctly stated by the Circuit Court of Appeals for the Second Circuit in the case of *Irving National Bank* v. *Law*, 9 Fed. (2d) 536, wherein that court, speaking through Circuit Judge Learned Hand, in refusing to follow the construction of a New York statute by the Appellate Division of the New York Supreme Court, an intermediate Appellate Court, said:

> "We understand the doctrine to mean that the highest court of the state, by declaring what a statute means, settles it, because there is no authority which can gainsay it. Yet, however conclusive between parties to a suit the decision of a lower court is of course not authoritative upon the highest court; the statute necessarily remains *in nubibus*, and its construction may be as it will."

Most recently, this Court indicated its accord with the rule as so stated, in the case of *Russell* v. *Todd*, 84 L. Ed. Advance Opinions 517, wherein this Court was required to determine the applicable Statute of Limitations under the law of New York where the precise question raised had not been decided by the New York Court of Appeals. This Court said, at page 523:

> "In the absence of a definitive ruling by the highest court of the state, we accept the decision of the Ap-

pellate Division and the reasoning of the Court of Appeals upon which it rests as persuasive that the three-year statute does not apply to suits like the present where the remedy is exclusively equitable. See *Wichita Royalty Co.* v. *City Nat. Bank,* 306 U. S. 103, 107, 83 L. Ed. 515, 517, 59 S. Ct. 420."

The above quoted language of the decision indicates clearly that this Court followed the decision of the Appellate Division, an intermediate Appellate Court, not because it felt bound by the said decision in the absence of a ruling upon the precise question by the court of last resort, but because the reasoning upon which the decision rested was persuasive.

It is submitted that the Circuit Court of Appeals correctly stated the rule, namely: That the Federal courts should in all instances follow the law of the state with respect to the construction of state statutes. Where that law has been determined by the courts of last resort their decisions are *stare decisis,* and must be followed irrespective of the Federal courts' opinion as to what the law ought to be. As to pronouncements of other state courts, however, the Federal courts are not so bound, but may conclude that the decision does not truly express the state law.

The conclusions of Circuit Judge Buffington, as stated in his concurring opinion below, emphasize more particularly the issue here presented. He said (R., p. 40):

"I concur in the conclusion reached by the court. The statute of New Jersey is clear and unambiguous; it calls for no construction. But the question is as to the enforcement of a law passed by a sovereign state in a matter of which it has jurisdiction. The wording of the statute is applicable to the facts of the present case. In the absence of any decision by the court of

highest resort of New Jersey holding the act unconstitutional and inapplicable, I am of opinion that this court is free to apply the statute to the facts of this case. I therefore concur in the conclusion reached."

POINT IV.

The judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

RUSSELL C. MACFALL,
Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1940.

No. 32.

FIDELITY UNION TRUST COMPANY and MINTON H. TWINCH, as Executors of the Last Will and Testament of Edith M. Peck, Deceased,

Petitioners,

vs.

ETHEL ADELAIDE FIELD,

Respondent.

PETITION FOR REHEARING.

RUSSELL C. MACFALL,
Counsel for Respondent.

THE COURT PRESS, N. Y. C.

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PETITION FOR REHEARING.

The respondent, Ethel Adelaide Field, presents this, her petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. The appeal herein was argued before this Court on November 12th and 13th, 1940.

2. On December 9th, 1940, this Court rendered its decision in favor of the petitioners and against the respondent, reversing the decree of the Circuit Court of Appeals for the Third Circuit and affirming the decree of the District Court.

3. The respondent seeks a rehearing of this cause upon the following grounds:

(a) The opinion of the Court states that:

> "It is inadmissible that there should be one rule of state law for litigants in the state courts

> and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship."

The effect of the Court's decision will be to bring about just that situation which is sought to be avoided and will create to the opposite extreme the lack of uniformity which existed prior to the decisions of this Court in *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, and *Ruhlin* v. *New York Life Insurance Co.,* 304 U. S. 202. Litigants in the State courts will be able to obtain in the State's appellate courts a review upon the merits of lower State court decisions construing a local statute, with the possibility that the appellate courts will refuse to follow as unsound the lower court construction, as the opinion of this Court duly pointed out. On the other hand, litigants in the Federal courts will be unable to obtain such a review of the lower State court decisions. The decision creates a possible situation wherein a litigant, favored by a lower State court decision which is based upon such doubtful reasoning that a reversal by the appellate court is probable, will, when possible, bring his suit in the Federal courts where the unpersuasive decision must be followed. Thus the effect of the decision of this Court, if permitted to stand, is to create a different rule for litigants in the Federal courts. It is respectfully submitted that the desired uniformity among State and Federal courts would be more fully achieved by recognizing in the Federal courts, while sitting as State courts in diversity of citizenship cases, powers equal to and not subordinate to those of the State courts. It has been said, in 53 Harvard Law Review 880, at page 882, in a commentary upon the decision of the court below in this suit: "Although the holding

of the principal cases may make possible a situation wherein a federal rule may prevail for a time in the same territory as a different state rule, any conflict will be dispelled when the highest state court passes on the point."

(b) This Court in stating that future disapproval, by the Court of Errors and Appeals, of the Court of Chancery decisions was merely a matter of conjecture, may have overlooked that the ultimate approval of such decisions by the State's highest court is equally a matter of conjecture. Although at first glance it appears that the Federal courts should not be required to guess the ultimate treatment of the question by the State's highest court, it is submitted that until the highest State court has spoken in any case involving local law, all lower courts to which the question is presented must attempt to decide the question upon all available persuasive authority assisted by the application of sound logic and fundamental principles. Conjecture gives way to probability where the reasoning and authority of the lower court decisions are persuasive, but probability bows to mere conjecture where the lower court decisions are required to be followed regardless of their inherent soundness.

(c) It is submitted that neither in the briefs nor on the argument was the Court reminded of the coordinate powers of the Federal courts of appeal where sitting in review of a judgment involving a question of local law which has not been finally settled by the State courts. In the case of *Wichita Royalty Co.* v. *City National Bank of Wichita Falls,* 306 U. S. 103, at page 107, this Court said:

> "* * *, the court below correctly stated that by reason of the removal it had been substituted for

> the Texas Supreme Court as the appropriate court of appeal and that it was its duty to apply the Texas law as the Texas court would have declared and applied it on a second appeal if the cause had not been removed. It was the duty of the federal court to apply the law of Texas as declared by its highest court."

If this statement is applicable, then the Federal appellate courts are charged with the duty of applying the New Jersey law as the Court of Errors and Appeals would have declared and applied it in an action in the State courts and, in the absence of any applicable decision by that court, it is submitted that the Federal courts should share the existent power of the State's courts to consider all available authority upon the merits and to differ, if necessary, with the Court of Chancery.

(d) It is submitted that the facts of the instant suit differ from the cases of *West* v. *American Telephone & Telegraph Co.* and *Six Companies of California* v. *Joint Highway District,* both decided by this Court simultaneously with the instant suit, in that while in those two cases the applicable State law had been authoritatively declared by the highest State court in which a decision could be had, the question of State law involved in this appeal has not been passed upon by any appellate court of New Jersey. While the distinction between the decisions of a trial court and those of an appellate court may appear to be somewhat tenuous when viewed objectively, it is nevertheless something more substantial to the litigant who has been deprived of any review upon the merits of the legal questions involved. The effect of the decision of this Court, if permitted to stand, will

be to deprive the respondent of the review, on the merits, of the Chancery decisions, to which she would have been entitled had the litigation been instituted in the State courts. (1937 Revised Statutes of New Jersey, 2:29-117.*) This again serves to indicate that the decision results in a different rule for litigants in the Federal courts.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted.

Dated: New York, December 30, 1940.

Respectfully submitted,

RUSSELL C. MACFALL,
Counsel for Respondent.

Certificate of Counsel.

I, RUSSELL C. MACFALL, counsel for the above named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

RUSSELL C. MACFALL,
Counsel for Respondent.

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* 2:29-117. Persons entitled; orders or decrees appealable. All persons aggrieved by any order or decree of the court of chancery may appeal therefrom, or any part thereof, to the court of errors and appeals.

SUPREME COURT OF THE UNITED STATES.

No. 32.—October Term, 1940.

Fidelity Union Trust Company and Minton H. Twinch, as Executors of the last Will and Testament of Edith M. Peck, Deceased, Petitioners, *vs.* Ethel Adelaide Field.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[December 9, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

In 1935, Edith M. Peck caused the title of a savings bank account standing in her name to be transferred on the records of the bank to "Edith M. Peck, in trust for Ethel Adelaide Field". Miss Peck retained exclusive control over the account, with sole right of withdrawal and right of revocation, and gave no further notice of the existence of a trust.

This suit was brought by Ethel Adelaide Field against the bank and the executors of Miss Peck to obtain a decree that the credit balance of the account belonged to the complainant. The executors denied the validity of the trust and claimed title. The District Court found in favor of the executors upon the ground that under the law of New Jersey there was no trust and no valid gift. The Circuit Court of Appeals reversed the judgment, holding that under a state statute the complainant was entitled to recover. In so ruling, the court declined to follow contrary decisions of the Chancery Court of New Jersey. 108 F. (2d) 521. In view of the importance of the question thus presented, we granted certiorari. 309 U. S. 652.

In 1932, the legislature of New Jersey passed four statutes, in similar terms and approved on the same date, dealing with trust deposits in banks. The text of one of these provisions is set forth in the margin.[1] Prior to these statutes, it had been the law of New

[1] Chapter 40, New Jersey Sessions Laws of 1932, Section 1, is as follows:

"1. Whenever any deposit shall be made with any savings bank, trust company or bank by any person in trust for another, and no other or further notice

Jersey that a mere savings bank deposit made by a decedent in his own name as trustee for another, over which the decedent exercised complete control during his life, was insufficient to establish a gift *inter vivos* or to create a trust as against the decedent's legal representatives. *Nicklas* v. *Parker*, 69 N. J. Eq. 743, affirmed, 71 N. J. Eq. 777; *Johnson* v. *Savings Investment and Trust Company*, 107 N. J. Eq. 547; affirmed, 110 N. J. Eq. 466.

The statutes of 1932 came before the Chancery Court of New Jersey in 1936, in two cases decided independently by two Vice-Chancellors, *Thatcher* v. *Trenton Trust Company*, 119 N. J. Eq. 408, and *Travers* v. *Reid*, 119 N. J. Eq. 416. In the *Thatcher* case it appeared that the decedent, at the time of her death in 1934, had two bank balances standing to her credit "in trust for Clifford Thatcher", the complainant. The bill was dismissed. The court found that there were no facts, beyond the mere opening of the account in that manner, "in any way tending to prove the declaration of a trust". The court examined the legislation of 1932, which it was argued had changed the law of the State, and after considering possible purposes of the legislature and analyzing the language employed, which was deemed to be "confused" and "difficult to comprehend", the court decided that the legislation was inoperative to change the law applicable to the facts before the court. In the *Travers* case, the decedent had changed his bank account to his name "in trust for Joseph Jennings", a minor. In a suit by the decedent's executrix to recover the money, a motion by the minor's guardian to strike the bill for want of equity and upon the ground that the fund was the property of the ward or held in trust for him, was denied. After stating the law as it stood before the statutes of 1932, the court concluded that they had not been effective to alter the previous legal requirements of a gift *inter vivos* or a valid trust. These cases were not reviewed by the Court of Errors

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of the existence and terms of a legal and valid trust shall have been given in writing to the savings bank, trust company or bank, in the event of the death of the trustee, the same or any part thereof, together with the dividends or interest thereon, shall be paid to the person in trust for whom the said deposit was made, or to his or her legal representatives and the legal representatives of the deceased trustee shall not be entitled to the funds so deposited nor to the dividends or interest thereon notwithstanding that the funds so deposited may have been the property of the trustee; *provided*, that the person for whom the deposit was made, if a minor, shall not draw the same during his or her minority without the written consent of the legal representatives of said trustee". See Revised Statutes of New Jersey, 1937, 17: 9-4.

and Appeals of New Jersey and, so far as appears, that court has not expressed an opinion upon the construction and effect of the statutory provisions.[2]

The Circuit Court of Appeals found it impossible to distinguish the facts in the two Chancery cases from those shown here. The court recognized its duty to follow the law of the State and said that where that law had been determined by the state court of last resort its decision must be followed irrespective of the federal court's opinion of what the law ought to be. But the majority of the Circuit Court of Appeals took the view that it was not so bound "by the pronouncements of other state courts" but might conclude that "the decision does not truly express the state law". The court held that the statute of 1932 was "clearly constitutional and unambiguous" and that "contrary decisions" of the Chancery Court of New Jersey were not binding. Accordingly, the judgment of the District Court was reversed.

We think that this ruling was erroneous. The highest state court is the final authority on state law (*Beals* v. *Hale*, 4 How. 37, 54; *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, 78), but it is still the duty of the federal courts, where the state law supplies the rule of decision,[3] to ascertain and apply that law even though it has not been expounded by the highest court of the State. See *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 209. An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed

[2] In Cutts v. Najdrowski, 123 N. J. Eq. 481 (1938), the Court of Errors and Appeals held that the validity of a trust of choses in action created by a transaction *inter vivos* was determined by the law of the place where the transaction occurred, in that case New York. In Trust Company of New Jersey v. Farawell, 127 N. J. Eq. 45 (1940), the Court of Errors and Appeals held that, where the decedent had made a deposit in her name in trust for her daughters, and the savings bank book was thereafter in the possession of the daughters and withdrawals were made upon the signatures of the mother and the daughters and were used for maintaining properties devised to the daughters by the mother shortly after the account was opened, there was sufficient evidence to show a presently effective trust. The court said that such a trust depends essentially upon the same principles "that activate a gift *inter vivos*, comprising donative intent, delivery of the subject-matter to the extent that delivery is possible or can be indicated, and the abdication by the donor of dominion over the subject-matter. *Id.*, p. 48. In these cases, the court did not refer to the statutes of 1932 or to the Chancery decisions cited in the above text".

[3] Judiciary Act of 1789, Sec. 34; R. S. 721, 28 U. S. C. 725.

by a federal court in deciding a state question. We have declared that principle in *West* v. *American Telephone and Telegraph Co.*, Nos. 44 and 45, decided this day. It is true that in that case an intermediate appellate court of the State had determined the immediate question as between the same parties in a prior suit, and the highest state court had refused to review the lower court's decision, but we set forth the broader principle as applicable to the decision of an intermediate court, in the absence of a decision by the highest court, whether the question is one of statute or common law.

Here, the question was as to the construction and effect of a state statute. The federal court was not at liberty to undertake the determination of that question on its own reasoning independent of the construction and effect which the State itself accorded to its statute. That construction and effect are shown by the judicial action through which the State interprets and applies its legislation. That judicial action in this instance has been taken by the Chancery Court of New Jersey and we have no other evidence of the state law in this relation. Equity decrees in New Jersey are entered by the Chancellor, who constitutes the Court of Chancery,[4] upon the advice of the Vice-Chancellors,[5] and these decrees, like the judgments of the Supreme Court of New Jersey are subject to review only by the Court of Errors and Appeals.[6] We have held that the decision of the Supreme Court upon the construction of a state statute should be followed in the absence of an expression of a countervailing view by the State's highest court (*Erie Railroad Co.* v. *Hilt*, 247 U. S. 97, 100, 101; *Erie Railroad Co.* v. *Duplak*, 286 U. S. 440, 444), and we think that the decisions of the Court of Chancery are entitled to like respect as announcing the law of the State.

While, of course, the decisions of the Court of Chancery are not binding on the Court of Errors and Appeals, a uniform ruling either by the Court of Chancery or by the Supreme Court over a course of years will not be set aside by the highest court "except for cogent and important reasons". *Ramsey* v. *Hutchinson*, 117 N. J. L. 222, 223. It appears that ordinarily the decisions of the Court of

[4] N. J. Constitution, Art. VI, Sec. 4.

[5] See Gregory v. Gregory, 67 N. J. Eq. 7, 10, 11; In re Appointment of Vice-Chancellors, 105 N. J. Eq. 759.

[6] Revised Statutes of New Jersey, 2: 27-350, 2: 29-117.

Chancery, if they have not been disapproved, are treated as binding in later cases in chancery (*Philadelphia & Camden Ferry Co.* v. *Johnson*, 94 N. J. Eq., 296, 297), but there is always, as respondent urges, the possibility that a particular decision of the Court of Chancery will not be followed by the Supreme Court (see *Flagg* v. *Johansen*, 124 N. J. L. 456, 461) or even by the Court of Chancery itself. See *Kicey* v. *Kicey*, 112 N. J. Eq. 459, 461. It is the function of the court of last resort to resolve such conflicts as may be created by decisions of the lower courts and except in rare instances that function is performed and the law is settled accordingly. Here, however, there is no conflict of decision. Whether there ever will be, or the Court of Errors and Appeals will disapprove the rulings in the *Thatcher* and *Travers* cases, is merely a matter of conjecture. See *West* v. *American Telephone and Telegraph Co., supra.* At the present time the *Thatcher* and *Travers* cases stand as the only exposition of the law of the State with respect to the construction and effect of the statutes of 1932, and the Circuit Court of Appeals was not at liberty to reject these decisions merely because it did not agree with their reasoning.

The question has practical aspects of great importance in the proper administration of justice in the federal courts. It is inadmissible that there should be one rule of state law for litigants in the state courts and another rule for litigants who bring the same question before the federal courts owing to the circumstance of diversity of citizenship. In the absence of any contrary showing, the rule of the *Thatcher* and *Travers* cases appears to be the one which would be applied in litigation in the state court, and whether believed to be sound or unsound, it should have been followed by the Circuit Court of Appeals.

The decree of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.